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101 No. 06-1037

In The

Supreme Court of the United States

Kentucky Retirement Systems,
Commonwealth of Kentucky, and
Jefferson County Sheriff's Department,
Petitioners,

v.

Equal Employment Opportunity Commission,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

JOINT APPENDIX

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U.S. DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
CASE NO. 3:99-CV-00500-JVC

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION — PLAINTIFF

v.

JEFFERSON COUNTY SHERIFF'S DEPARTMENT, KENTUCKY RETIREMENT SYSTEMS, COMMONWEALTH OF KENTUCKY — DEFENDANTS

RELEVANT DOCKET ENTRIES

Filing Date	Docket No.	Docket Text
08/02/1999	1	COMPLAINT filed (Entered: 08/02/1999)
08/24/1999	2	ANSWER by defendant KY Commonwealth (Entered: 08/25/1999)
08/25/1999	3	ANSWER by defendant Jefferson Cty Sherif (Entered: 08/25/1999)
08/25/1999	4	ANSWER by defendant KY Retirement Systems (Entered: 08/25/1999)
12/02/2002	72	MOTION by plaintiff EEOC for summary judgment; memorandum in support; order

Filing Date	Docket No.	Docket Text
		tendered (Entered: 12/02/2002)
04/07/2003	99	RESPONSE by defendant KY Retirement Systems to motion for summary judgment and memo in support of cross-motion for summary judgment (Entered: 04/08/2003)
04/07/2003	100	CROSS-MOTION by defendant KY Retirement Systems for summary judgment; memorandum in support; deposition of Thomas Levy (Entered: 04/08/2003)
04/07/2003	101	AFFIDAVIT of William P. Hanes (Entered: 04/08/2003)
06/09/2003	106	RESPONSE by plaintiff EEOC to cross-motion for summary judgment; attachments; order tendered (Entered: 06/09/2003)
06/09/2003	106	REPLY by plaintiff EEOC to response to motion for summary judgment (Entered: 06/09/2003)

Filing Date	Docket No.	Docket Text
06/25/2003	114	REPLY by defendant KY Retirement Systems to response to motion for summary judgment (Entered: 06/26/2003)
09/04/2003	136	ORDER by Judge Jennifer B. Coffman on 9/3/2003; denying [72] Motion for Summary Judgment. Granting [100] dfts. Motion for Summary Judgment, the pla. claims are DISMISSED w/prejudice. As the pla. claims against the other dfts. are identical and based upon the same statutory language, and the Ct. has found that there were no violations of the ADEA, IT IS FURTHER ORDERED that the pla. claims against the Commonwealth of KY & Jeff. Cty Sheriff's Office are also DISMISSED w/prej (Entered: 09/04/2003)
09/04/2003	137	JUDGMENT by Judge Jennifer B. Coffman on 9/3/2003; in favor of dft. KY Retirement Systems

Filing Date	Docket No.	Docket Text
		against Pla. This is a FINAL & APPEALABLE order, This matter is stricken from the Court's active docket. (Entered: 09/04/2003)
11/03/2003	138	NOTICE OF APPEAL as to Order on Motion for Summary Judgment by Equal Employment Opportunity Commission. (Entered: 11/03/2003)

U.S. COURT OF APPEALS
FOR THE SIXTH CIRCUIT
#03-6437

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION	PLAINTIFF-APPELLANT
v.	
JEFFERSON COUNTY SHERIFF'S DEPARTMENT, KENTUCKY RETIREMENT SYSTEMS, COMMONWEALTH OF KENTUCKY	DEFENDANT-APPELLEES

RELEVANT DOCKET ENTRIES

Filing Date	Description
11/04/2004	FINAL BRIEF filed by James D. Allen, C. Joseph Beavin, Lizbeth A. Tully and Robert D. Klausner for Appellee KY Retirement Sys; Mitchell L. Perry for Appellee Jefferson Cnty; D. Brent Irvin for Appellee Ky.
11/18/2004	FINAL BRIEF filed by Dori K. Bernstein for Appellant EEOC.
11/18/2004	FINAL REPLY BRIEF filed by Dori K. Bernstein for Appellant EEOC.
09/19/2005	OPINION filed: The judgment of the district court granting summary judgment in favor of Kentucky Retirement is AFFIRMED, decision

Filing Date	Description
	for publication pursuant to local rule 206 [03-6437]. John M. Rogers, Authoring Judge, Jeffrey S. Sutton, Circuit Judge, Gerald E. Rosen, District Judge for the Eastern District of Michigan, sitting by designation
09/19/2005	JUDGMENT: The judgment of the district court is AFFIRMED.
10/12/2005	PETITION for en banc rehearing filed by Dori K. Bernstein for Appellant EEOC.
11/23/2005	RESPONSE to a petition for en banc rehearing [3251099-1] filed by Dori K. Bernstein. Response filed by James D. Allen for Appellee KY Retirement Sys.
10/31/2006	OPINION filed: REVERSE the district court's grant of summary judgment to defendants and REMAND to the district court for further proceedings consistent with this opinion, decision for publication pursuant to local rule 206. [03-6437] Danny J. Boggs, Chief Judge dissenting, Boyce F. Martin, Circuit Judge, Alice M. Batchelder, Circuit Judge, Martha Daughtrey, Circuit Judge, Karen N. Moore, Authoring Judge, R.G. Cole, Circuit Judge, Eric L. Clay, Circuit Judge, Ronald L. Gilman, Circuit Judge, Julia S. Gibbons, Circuit Judge, John M.

Filing Date	Description
	Rogers, Circuit Judge concurring separately, Jeffrey S. Sutton, Circuit Judge, Deborah L. Cook, Circuit Judge, David W. McKeague, Circuit Judge, Richard A. Griffin, Circuit Judge.
10/31/2006	JUDGMENT: The granting of summary judgment to defendants by the district court is REVERSED and the case is REMANDED for further proceedings consistent with the opinion of this court.
11/30/2006	ORDER filed granting motion to stay mandate [3480795-1] filed by Mitchell L. Perry, D. Brent Irvin, C. Joseph Beavin, Lizbeth A. Tully, Robert D. Klausner. [03-6437] Danny J. Boggs, Chief Judge, Boyce F. Martin, Circuit Judge, Alice M. Batchelder, Circuit Judge, Martha C. Daughtrey, Circuit Judge, Karen N. Moore, Circuit Judge, R.G. Cole, Circuit Judge, Eric L. Clay, Circuit Judge, Ronald L. Gilman, Circuit Judge, Julia S. Gibbons, Circuit Judge, John M. Rogers, Circuit Judge, Jeffrey S. Sutton, Circuit Judge, Deborah L. Cook, Circuit Judge, David W. McKeague, Circuit Judge, Richard A. Griffin, Circuit Judge.

Filing Date	Description
02/01/2007	U.S. Supreme Court notice filed regarding petition for writ of certiorari filed by Appellee KY Retirement Sys. Filed in the Supreme Court on 01-23-07, Supreme Ct. case number: 06-1037. [03-6437]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION	)	
PLAINTIFF,	)	CIVIL ACTION NO. 3:99CV500(C)
v.	)	
JEFFERSON COUNTY SHERIFF'S OFFICE, KENTUCKY RETIREMENT SYSTEMS & THE COMMONWEALTH OF KENTUCKY	)	**COMPLAINT**
DEFENDANTS.	)	

NATURE OF THE ACTION

This is an action under the Age Discrimination in Employment Act to correct unlawful employment practices on the basis of age. This action seeks appropriate relief for Charles Lickteig and a class of individuals aggrieved by those unlawful employment practices. The Commission alleges that since at least October 16, 1992, Defendants have discriminated against a class of individuals age forty (40) or over on the basis of age by maintaining a disability retirement program which denies benefits or pays reduced benefits, because of age.

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 451, 1331, 1337, 1343 and 1345. This action is authorized and instituted pursuant to Section 7(b) of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 626(b) (the "ADEA"), which incorporates by reference Section 17 of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 217.

2. The employment practices alleged to be unlawful were committed within the jurisdiction of the United States District Court for the Western District of Kentucky, Louisville Division.

PARTIES

3. Plaintiff, the Equal Employment Opportunity Commission (the "Commission"), is the agency of the United States of America charged with the administration, interpretation and enforcement of the ADEA and is expressly authorized to bring this action by Section 7(b) of the ADEA, 29 U.S.C. § 626(b), as amended by Section 2 of Reorganization Plan No. 1 of 1978, 92 Stat. 3781, and by Public Law 98-532 (1984), 98 Stat. 2705.

4. At all relevant times, Defendant Jefferson County Sheriff's Department, ("Sheriff's Department") has continuously been an agency or instrumentality of a political subdivision of the Commonwealth of Kentucky.

5. At all relevant times, Defendant Sheriff's Office has continuously been an employer within the meaning of Section 11(b) of the ADEA, 29 U.S.C. § 630(b).

6. At all relevant times, Defendant, Kentucky Retirement Systems, ("KRS") has continuously been an agency or instrumentality of the Commonwealth of Kentucky.

7. At all relevant times, Defendant KRS has continuously been an employer within the meaning of Section 11(b) of the ADEA, 29 U.S.C. § 630 (b).

8. At all relevant times, Defendant, Commonwealth of Kentucky ("Commonwealth") has been a State Government.

9. At all relevant times, Defendant Commonwealth has continuously been an employer within the meaning of Section 11(b) of the ADEA, 29 U.S.C. § 630(b).

CONCILIATION

10. Prior to institution of this lawsuit, the Commission's representatives attempted to eliminate the unlawful employment practices alleged below and to effect voluntary compliance with the ADEA through informal methods of conciliation, conference and persuasion within the meaning of Section 7(b) of the ADEA, 29 U.S.C. § 626(b).

STATEMENT OF CLAIMS

11. Since at least October 16, 1992, Defendants have engaged in unlawful employment practices, in violation of Section 4(a)(1) of the ADEA, 29 U.S.C. § 623(a)(1), by maintaining a disability retirement program which discriminates on the basis of age against a class of individuals age forty (40) or older, by denying disability retirement benefits to those over the age of 55 (hazardous) or 65 (nonhazardous) and by paying lower disability retirement benefits to a class of disabled individuals age forty (40) or older.

12. The effect of the practices complained of in paragraph 11 above has been to deprive aggrieved individuals of equal employment opportunities and otherwise adversely affect their status as employees, because of age.

PRAYER FOR RELIEF

Wherefore, the Commission respectfully requests that this Court:

A. Grant a permanent injunction enjoining Defendant Sheriff's Department, its officers, successors, assigns and all persons in active concert or participation with it, from engaging in any employment practice which discriminates on the basis of age against individuals forty (40) years of age and older.

B. Grant a permanent injunction enjoining Defendant KRS, its officers, successors, assigns and all

persons in active concert or participation with it, from engaging in any employment practice which discriminates on the basis of age against individuals forty (40) years of age and older.

C. Grant a permanent injunction enjoining Defendant Commonwealth, its officers, successors, assigns and all persons in active concert or participation with it, from engaging in any employment practice which discriminates on the basis of age against individuals forty (40) years of age and older.

D. Order Defendant Commonwealth to enact permanent legislation providing that KRS disability retirement benefits will be granted and calculated without regard to age.

E. Order Defendant Sheriff's Department to institute and carry out policies, practices and programs which provide equal employment opportunities for individuals forty (40) years of age and older, and which eradicate the effects of its past and present unlawful employment practices.

F. Order Defendant KRS to institute and carry out policies, practices and programs which provide equal employment opportunities for individuals forty (40) years of age and older, and which eradicate the effects of its past and present unlawful employment practices.

G. Order Defendant Commonwealth to institute and carry out policies, practices and programs which provide equal employment opportunities for

individuals forty (40) years of age and older, and which eradicate the effects of its past and present unlawful employment practices.

H. Order Defendant Sheriff's Department to make whole Charles Lickteig and the class of individuals whose monetary benefits are being unlawfully withheld as a result of the acts complained of above, by restraining the continued withholding of amounts owing as back benefits with prejudgment interest and recalculated future benefits, in amounts to be determined at trial.

I. Order Defendant KRS to make whole Charles Lickteig and the class of individuals whose monetary benefits are being unlawfully withheld as a result of the acts complained of above, by restraining the continued withholding of amounts owing as back benefits with prejudgment interest and recalculated future benefits, in amounts to be determined at trial.

J. Order Defendant Commonwealth to make whole Charles Lickteig and the class of individuals whose monetary benefits are being unlawfully withheld as a result of the acts complained of above, by restraining the continued withholding of amounts owing as back benefits with prejudgment interest and recalculated future benefits, in amounts to be determined at trial.

K. Order Defendant Sheriff's Department to make whole all individuals adversely affected by the unlawful practices described above, by providing any other affirmative relief necessary to eradicate the effects of its unlawful practices, including but not

limited to reimbursement for purchase of years of service.

L. Order Defendant KRS to make whole all individuals adversely affected by the unlawful practices described above, by providing any other affirmative relief necessary to eradicate the effects of its unlawful practices, including but not limited to reimbursement for purchase of years of service.

M. Order Defendant Sheriff's Commonwealth to make whole all individuals adversely affected by the unlawful practices described above, by providing any other affirmative relief necessary to eradicate the effects of its unlawful practices, including but not limited to reimbursement for purchase of years of service.

N. Grant such further relief as the Court deems necessary and proper in the public interest.

O. Award the Commission its costs of this action.

Respectfully submitted,

C. GREGORY STEWART
General Counsel

/s/
LAURIE A. YOUNG, #11480-49
Regional Attorney

/s/
MICHELLE EISELE, #12070-49
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/s/
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Senior Trial Attorney

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UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CIVIL ACTION NO. 3:99CV500(C)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION — PLAINTIFF

v.

JEFFERSON COUNTY SHERIFF'S OFFICE, KENTUCKY RETIREMENT SYSTEMS and THE COMMONWEALTH OF KENTUCKY — DEFENDANTS

AFFIDAVIT OF WILLIAM P. HANES

Affiant, William P. Hanes, upon being duly sworn, states as follows based on his own knowledge and belief:

1. I am the Executive Director of Kentucky Retirement Systems ("Kentucky Retirement") and have in that capacity become familiar with the state retirement plan administered by Kentucky Retirement, the age discrimination claim brought by Charles T. Lickteig before the Equal Employment Opportunity Commission ("EEOC"), and the EEOC's review of such claim.

2. On July 12, 1995 Charles T. Lickteig ("Lickteig") submitted a Notification of Retirement requesting disability retirement from County

Employees' Retirement System which is administered by Kentucky Retirement.

3. At that time, Lickteig was 61 years old and had a total of 17 years 7 months of service (63 months were in a hazardous duty position and 148 months were in non-hazardous duty). Lickteig was thus eligible for unreduced retirement benefits under the provisions of KRS 16.576(1) and KRS 16.505(15) which are made applicable to members of the County Employees' Retirement System engaged in hazardous duty through KRS 78.545(31) and KRS 61.592(4).

4. In accordance with KRS 16.582(2)(b), made applicable to members of the County Employees' Retirement System engaged in hazardous duty through KRS 78.545(40), Lickteig's eligibility for unreduced retirement benefits rendered him ineligible for disability retirement benefits. His application for disability retirement benefits was therefore denied. Lickteig continued to work, but thereafter filed an age discrimination claim with the EEOC, contending that he was unlawfully denied disability retirement benefits because of his age.

5. On June 26, 1996, Lickteig reapplied for retirement benefits, requesting unreduced retirement benefits which were subsequently awarded to him. His last day of employment was June 28, 1996. By this time, Lickteig had 223 months of service; 148 months were in a non-hazardous duty position, 74 months were in hazardous duty, and 1 month was

attributed to accumulated sick leave.[1] Lickteig additionally purchased 22 months of military service,[2] bringing the total years of service upon which his benefits were based to 245 months.

6. The EEOC conducted an extensive investigation of Lickteig's discrimination claim, informally requesting on eight separate occasions that Kentucky Retirement provide a multitude of documents.

7. In addition, the EEOC issued two subpoenas against Kentucky Retirement.

8. Kentucky Retirement fully responded to each informal request for documentation and each subpoena, providing the EEOC with computer discs and a massive volume of hard copy documents.

9. Kentucky Retirement gave the EEOC its complete cooperation over the two-year period during which the EEOC investigation spanned.

10. On August 12, 1998 the EEOC issued a Determination finding "there is reasonable cause to believe that Respondent has violated the ADEA."

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[1] See KRS 78.616. See also KRS 61.546.

[2] See KRS 61.555, applied to the County Employees' Retirement System members through KRS 78.545(6).

11. By way of letter dated September 15, 1998 the EEOC asked if Kentucky Retirement was "interested in conciliation".

12. Since Kentucky Retirement was strongly interested in resolving the matter outside the context of litigation it responded positively to the EEOC's inquiry and met with the EEOC on November 9, 1998.

13. Kentucky Retirement attended the meeting with every intention of working out a joint resolution of the matter. During the conciliation meeting, Kentucky Retirement proposed the promulgation of an administrative regulation as a means of resolving the dispute.

14. The EEOC's representatives who attended the conciliation meeting indicated that this proposal was acceptable to the EEOC.

15. By letter dated November 13, 1998, the EEOC confirmed that the proposed regulation should be provided to it no later than November 23, 1998.

16. Kentucky Retirement complied with that request and submitted to the EEOC a conciliation proposal on November 23, 1998.

17. The EEOC responded to the proposal by letter dated December 3, 1998 which stated in part "The Commission has determined that efforts to conciliate these charges as required by the Age Discrimination in Employment Act of 1967 (ADEA) have been unsuccessful. No further efforts to conciliate this case will be made."

18. Kentucky Retirement was afforded no opportunity to address any factors which the EEOC deemed to be deficiencies in Kentucky Retirement's conciliation proposal. Instead, the EEOC brought suit against Kentucky Retirement charging, in general, that the state retirement plan violates the ADEA.

19. During the EEOC investigation, Kentucky Retirement consulted its actuary, who, based upon his ongoing experience with Kentucky Retirement's plan, advised Kentucky Retirement that the categories created under the state retirement plan were cost justified.

20. After this litigation began, Kentucky Retirement contacted Thomas D. Levy ("Levy") of Segal Company who conducted a formal study of the costs associated with the retirement plan. The formal study confirmed the initial conclusion of Kentucky Retirement's actuary, that the cost of providing benefits under the statutory scheme increased with age. A transcript of Levy's deposition is filed herein in support of the Cross-Motion for Summary Judgment. His report is contained in Exhibit 12 to the deposition.

21. Although I am not now, and have never been a member of the Kentucky General Assembly, and I have not been authorized to speak on behalf of either the current or former members of the Kentucky General Assembly, it is my opinion, after having studied the legislative history of the statutory scheme wherein the state retirement plan is set forth, that the plan is driven by a policy determination that the members of the plan should receive some kind of retirement benefit. The benefits which the members

anticipate receiving are unreduced retirement benefits.[3] A second category of retirement benefits, disability retirement benefits, was created to render assistance to those members who become disabled before becoming eligible for unreduced retirement benefits.

22. It is my understanding that the motivating factor behind establishing this second category of benefits was to provide assistance to members who are unable to continue working, but would not have a source of income through unreduced retirement benefits.

23. It is further my understanding that economic considerations require that the special category of benefits, disability retirement benefits, be limited solely to those who are not otherwise eligible to receive the anticipated benefits, unreduced retirement benefits either via normal retirement or service retirement.

Further, the affiant sayeth not this 27 day of February, 2003.

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[3] There are two routes to receiving unreduced retirement benefits. The first route is based on age and years of service ("normal retirement"), e.g., KRS 16.576 [made applicable to members of the County Employees' Retirement System in hazardous duty through KRS 78.545(31) and KRS 61.592(4)]; the second is based on years of service alone ("service retirement"), e.g., KRS 16.577(2) [made applicable to members of the County Employees' Retirement System in hazardous duty through KRS 78.545(31) and KRS 61.592(4)].

/s/
WILLIAM P. HANES

STATE OF KENTUCKY)
)
COUNTY OF FRANKLIN)

Subscribed, sworn to, and acknowledged before me by William P. Hanes on this the 27th day of February, 2003.

My Commission Expires: 12/14/03

/s/
NOTARY PUBLIC

(Certificate of Service omitted in printing)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CIVIL ACTION NO. 99-500-JBC

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION, PLAINTIFF,

v.

JEFFERSON COUNTY
SHERIFF'S OFFICE, ET AL., DEFENDANTS.

ORDER

This action is before the court on the parties' cross-motions for summary judgment (Docket Nos. 72 and 100). For the following reasons, the defendant's motion will be granted and the plaintiff's motion will be denied.

Factual Background

Charles Lickteig applied for disability retirement benefits with the County Employees' Retirement System in 1995. His request was denied because he was already eligible for normal retirement. Lickteig continued working until 1996, and then took normal retirement. He sought the aid of the EEOC, which now alleges that the disability retirement policy violates the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq., because it discriminates against a class of individuals age forty and over on the basis of age.

Summary Judgment Motions

The plaintiff claims that it is entitled to summary judgment as to liability because the defendants violated the ADEA by paying reduced disability retirement benefits, or denying them altogether, to employees age forty or over. Further, the plaintiff states that the affirmative defenses raised by the defendants are unavailable or not established.

The defendant, Kentucky Retirement Systems, asserts that it is entitled to summary judgment because the plaintiff has failed to make out a *prima facie* case of discrimination or, in the alternative, because their affirmative defenses absolve them of liability. The defendant is also claiming that it is entitled to summary judgment because the EEOC failed to conciliate in good faith. Because the motion will be disposed of on the first ground, it is the only one that will be discussed.

Disability Retirement System

The disability retirement system in dispute is part of an overall retirement plan administered by Kentucky Retirement Systems. There is a single fund from which both normal retirement benefits and disability retirement benefits are paid. KRS § 78.5203. No employee may receive both types of benefits, as that would constitute "double dipping."

Once an employee becomes eligible for normal retirement benefits, that person is no longer eligible for disability retirement, and he will take normal retirement benefits when he retires. *See* KRS

§ 16.582. Eligibility for normal retirement occurs in one of two ways: either when an employee has reached the age of fifty-five and has five years of service, or when an employee has twenty years of service at any age.[1] KRS §§ 16.576, 16.577, 61.595. After an employee has attained either status, he is eligible for normal retirement and, as a consequence, is no longer eligible for disability retirement.

If an employee does receive disability retirement benefits, he may be eligible for service credits, that is, years of service not actually worked but imputed to the employee. Service credits and actual years of service together cannot exceed twenty years. KRS § 16.582. Service credits awarded cannot exceed the number of actual years of service. *Id.* Service credits are calculated beginning with the last date of paid service and continuing through a disabled employee's fifty-fifth birthday. *Id.*

Legal Analysis

The purpose of the ADEA is to prevent people from being deprived of benefits on the basis of inaccurate and stigmatizing stereotypes. *Wexler v. White's Fine Furniture,* 317 F.3d 564, 572 (6th Cir. 2003). If prohibited stereotypes have not played a role in the

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[1] These are the requirements for eligibility for a hazardous worker. There are different requirements for non-hazardous workers. Because the claimant was a hazardous employee, and the same analysis applies for both types of employees, for the sake of clarity and simplicity the elements of hazardous employee retirement eligibility will be referred to in this order.

institution of the disability retirement benefits plan, then the plan is not the result of inaccurate and denigrating generalizations about age, but instead represents an accurate judgment about employees. *See Hazen Paper Co. v. Biggins,* 507 U.S. 604 (1993). In order to analyze whether a disability retirement policy is discriminatory, the court uses the *McDonnell Douglas* three-part test. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973). First, the plaintiff must establish a *prima facie* case; second, the defendant must offer legitimate, nondiscriminatory reasons for its actions; and third, the plaintiff must then prove that the reasons cited by the defendant are mere pretexts designed to mask age discrimination. *Wexler,* 317 F.3d at 574.

In this disparate treatment claim, the plaintiff must show that the defendants treat some employees less favorably because of their age and that the defendants have discriminatory intent. *See Lyon v. Ohio Education Association and Professional Staff Union,* 53 F.3d 135 (6th Cir. 1995). Liability depends on whether age actually motivates the decision of the party accused of discrimination. *See Hazen Paper Co.,* 507 U.S. 604. Intent may be shown if the disability retirement program is facially discriminatory. *See International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Johnson Controls, Inc.,* 499 U.S. 187 (1991); *Solon v. Gary Community School Corp.,* 180 F.3d 844 (7th Cir. 1999). The test for facial discrimination in a statute is whether the evidence shows treatment of a person in a manner which but for that person's age would be different. *Johnson Controls, Inc.,* 499 U.S. at 201. Facial discrimination depends on the terms of the

discrimination rather than the motive. In a retirement policy, age is necessarily a factor, as the very nature of such a program requires age considerations. In this disability retirement policy, retirement eligibility is a product of age and years of service. However, finding a retirement policy facially discriminatory merely because age is a factor in the plan is illogical, and the court will not do so now. While discriminatory intent may not be required to show that a statute is facially discriminatory, some indication beyond the fact that a retirement policy uses age and years of service in its retirement eligibility scheme is needed in this case. Without any such indication, the plaintiff is asking the court to hold that age cannot be explicitly referred to in a retirement policy without violating the ADEA, and the court cannot so hold without undermining virtually every retirement policy in existence. Further, finding a retirement policy discriminatory because it calculates retirement eligibility based on age and years of service does nothing to further the purpose of the ADEA, which is to prevent employers from making employment decisions (including provision of benefits) based on denigrating stereotypes about age.

The plaintiff also alleges that the mechanism used to calculate service credits in the disability retirement policy is facially discriminatory because the closer an employee is to reaching normal retirement age (fifty-five) before becoming disabled and seeking disability retirement benefits, the fewer service credits the

employee is eligible to receive.[2] In *Lyon,* "Option B," a portion of an early retirement policy which allowed for years of service to be imputed to an employee retiring early, was attacked as being discriminatory. The court emphasized again and again the importance of proving discriminatory intent in a disparate treatment claim. In that case, the court found that the plaintiff had not made out a *prima facie* case of discrimination because he had shown no evidence of discriminatory intent. The service credits portion of the disability retirement policy in question in this case is similar, and there is no evidence of discriminatory intent presented here. The plaintiff has failed to show how this retirement plan's age elements are discriminatory, either facially or through disparate treatment combined with intent.

Alternatively, the plaintiff states that the defendant violated the ADEA by forcing Lickteig into retirement. *See* 29 U.S.C. § 623(f)(2). In order to analyze a claim of forced retirement, the court must ask whether a reasonable person in the employee's position would feel compelled to resign under the circumstances. *Kalvinskas v. California Institute of Technology,* 96 F.3d 1305, 1308 n. 5 (9th Cir. 1996) *(quoting Bondar v. Synpol,* 843 F.2d 190, 192-3 (5th Cir. 1988)). However, an employee who leaves his employment willingly is precluded from arguing that he was constructively discharged or forced into retirement. *See Lapointe v. United Autoworkers,* 103 F.3d 485 (6th Cir. 1996). A reasonable person in

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[2] As noted above, service credits also decrease as the employee nears twenty years of actual service, because the employee would be eligible for normal retirement at that time.

Licktieg's position would not have felt compelled to retire. The plaintiff was entitled to unreduced retirement benefits, regardless of whether he continued to work. He was no longer entitled to receive disability retirement because he was eligible for normal retirement, and this was the case regardless of whether he resigned. Further, the plaintiff willingly left his employment, and he cannot now claim that he was forced to retire.

The plaintiff argues that he does not have to prove a *prima facie* case of discrimination because he has presented direct evidence of discrimination, in that the statutes describing the disability retirement plan are facially discriminatory. As the court holds that the retirement plan is not facially discriminatory, there is no evidence of discrimination. However, as discussed below, even if the court were to accept that the plaintiff has established a *prima facie* case, or that he was excused from that requirement, he has not proven that the defendant's legitimate reasons for the disputed portions of the retirement plan are mere pretexts designed to mask age discrimination, and so he cannot succeed on his claims.

Assuming that the plaintiff has presented a *prima facie* case, the defendant must offer legitimate, nondiscriminatory reasons for the challenged disability retirement policies. There is one retirement fund which is used for both normal retirement and disability retirement. No employee may "double dip" and receive both types. The option to take disability retirement benefits is just one of the two alternative means of receiving retirement benefits from the common fund open to employees. Disability

retirement is for those employees who become disabled and are forced to retire prematurely. An employee cannot pick and choose which type of benefits to receive because one type is only for those employees who become disabled before they are entitled to receive normal retirement, and not because the disability retirement benefits plan discriminates against older workers.

Service credits are intended to bring the disabled employee's service years up to the number he might have worked if he had not become disabled. The credits are an attempt to provide an employee who becomes disabled before normal retirement with benefits similar to those which, had the employee been capable of continuing work through normal retirement, he would have been entitled to receive. The service credit calculation takes age into consideration because the credits are intended only to provide the disabled employee with those benefits that would have been available through normal retirement had the employee not become disabled, not to provide the disabled employee with more benefits than normal retirement would have allowed. Thus, age comes into play in the determination only because age is one of the factors of retirement eligibility.

As the defendant has come forward with valid, nondiscriminatory reasons for the disputed elements of the disability retirement benefits plan, the plaintiff must prove that the reasons stated by the defendant are mere pretext designed to mask discrimination. The plaintiff's only allegations against the defendant were based on the assumption that the disability retirement statutes were facially discriminatory.

Because the court finds that they are not facially discriminatory, the plaintiff's only remaining argument is that the defendant uses the combination of service years and age to comprise the components of eligibility for retirement as a proxy for age. Again, age will always be a factor in retirement plans. The fact that a combination of service years and age will often be used to compute retirement eligibility is an actuarial reality and not a mask used to hide discrimination. Accordingly,

IT IS ORDERED that the plaintiff's motion for summary judgment (DE 72) is **DENIED.**

IT IS FURTHER ORDERED that the defendant's motion for summary judgment (DE 100) is **GRANTED.** The plaintiff's claims are **DISMISSED WITH PREJUDICE.**

As the plaintiff's claims against the other defendants are identical and based upon the same statutory language, and the court has found that there was no violation of the ADEA,

IT IS FURTHER ORDERED that the plaintiff's claims against the Commonwealth of Kentucky and the Jefferson County Sheriff's Office are also **DISMISSED WITH PREJUDICE.**

This the 3rd day of September, 2003.

/s/
JENNIFER B. COFFMAN, JUDGE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY

JA 33

ENTERED

SEPT 4, 2003

JEFFREY A. APPERSON, CLERK
BY: /s/
DEPUTY CLERK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CIVIL ACTION NO. 99-500-JBC

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION, PLAINTIFF,

v.

JEFFERSON COUNTY
SHERIFF'S OFFICE, ET AL., DEFENDANTS.

* * * * *

JUDGMENT

The court, having granted summary judgment in favor of the defendant, Kentucky Retirement Systems, and having dismissed the plaintiff's claims with prejudice, enters judgment in favor of the defendants.

This is a **FINAL** and **APPEALABLE** order, and no just cause for delay exists.

This matter is **STRICKEN** from the court's active docket.

This the 3rd day of September, 2003.

/s/
JENNIFER B. COFFMAN, JUDGE
UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY

JA 35

ENTERED

SEPT 4, 2003

JEFFREY A. APPERSON, CLERK
BY: /s/_____
DEPUTY CLERK

RECOMMENDED FOR FULL-TEXT
PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 05a0397p.06

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

v. No. 03-6437

JEFFERSON COUNTY SHERIFF'S DEPARTMENT, KENTUCKY RETIREMENT SYSTEMS, and COMMONWEALTH OF KENTUCKY,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Kentucky at Louisville.
No. 99-00500—Jennifer B. Coffman, District Judge.

Argued: July 28, 2005

Decided and Filed: September 19, 2005

Before: ROGERS and SUTTON, Circuit Judges; ROSEN, District Judge.*

COUNSEL

ARGUED: Eric S. Dreiband, OFFICE OF GENERAL COUNSEL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Appellant. Robert D. Klausner, KLAUSNER & KAUFMAN, Plantation, Florida, for Appellees. **ON BRIEF**: Eric S. Dreiband, Dori K. Bernstein, OFFICE OF GENERAL COUNSEL, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Appellant. Robert D. Klausner, KLAUSNER & KAUFMAN, Plantation, Florida, Mitchell L. Perry, JEFFERSON COUNTY ATTORNEY'S OFFICE, Louisville, Kentucky, James D. Allen, C. Joseph Beavin, Lizbeth A. Tully, STOLL, KEENON & PARK, Lexington, Kentucky, D. Brent Irvin, OFFICE OF THE ATTORNEY GENERAL, Frankfort, Kentucky, for Appellees.

OPINION

ROGERS, Circuit Judge. Plaintiff Equal Employment Opportunity Commission ("EEOC") appeals the district court's dismissal of its case on defendants' motion for summary judgment. The suit

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* The Honorable Gerald E. Rosen, United States District Judge for the Eastern District of Michigan, sitting by designation.

is a public enforcement action under the Age Discrimination in Employment Act ("ADEA") against defendants the Kentucky Retirement System, the Jefferson County Sheriff's Office, and the Commonwealth of Kentucky (collectively "Kentucky Retirement"). The EEOC alleges that the defendants operate an employee benefit plan that pays less disability retirement benefits to older employees because of their age in a manner that violates the ADEA. Under our court's holding in *Lyon v. Ohio Education Association and Professional Staff Union,* 53 F.3d 135 (6th Cir. 1995), the Kentucky Retirement System plan does not appear to violate the ADEA. The use of age in the Kentucky Retirement System plan is indistinguishable from the use of age in the early retirement plan at issue in *Lyon,* which was held not to violate the ADEA. The judgment of the district court is therefore affirmed.

I.

At issue is the retirement plan for certain state and county employees administered by the Kentucky Retirement System. An employee's eligibility is determined by statute. There are three separate systems in the overall retirement plan: the County Employees' Retirement System, the Kentucky Employees Retirement System, and the State Police Retirement System. Ky. Rev. Stat. §§ 16.150, 61.515, 78.520. Members in each system are classified as occupying "hazardous position[s]" or nonhazardous positions. Ky. Rev. Stat. § 61.592. An employee in a hazardous position is eligible to receive normal retirement benefits at age 55, or with twenty years of service, Ky. Rev. Stat. §§ 16.576, 16.577(2), 61.592(4),

78.545(31), whereas an employee in a nonhazardous position is eligible to receive normal retirement benefits at age 65. Ky. Rev. Stat. § 61.510(18). The EEOC does not challenge the way in which the plan provides for normal retirement under either system.

For purposes of clarity, Kentucky Retirement and the district court below discussed the application of the retirement plan only to hazardous position employees, as the EEOC's claimant was last employed in a hazardous position. We adopt this practice also.

This case involves the additional provision, under the plan, of *disability* retirement benefits, available to employees who become disabled before they are eligible for normal retirement benefits.[1] The scheme appears to disadvantage older workers by virtue of the fact that a class of workers, determined in significant part by age (actually youth), gets unworked years

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[1] Two separate versions of the governing statute are at issue. Prior to July 2000, an employee was not eligible to receive disability retirement benefits unless he was "less than normal retirement age." Ky. Rev. Stat. § 16.582(2)(b) (1999), Ky. Rev. Stat. § 61.600(1)(b) (1999). After this litigation began, the provisions were amended, and currently provide that an employee is not eligible for retirement disability benefits if the employee is "eligible for an unreduced retirement allowance." Ky. Rev. Stat. § 16.582(2)(b) (2001) (effective July 14, 2000); *see* 2000 Ky. Acts 385, at *4. Under both versions, an employee who is 55 or older cannot receive disability retirement benefits. In addition, under the current version, an employee who became eligible to receive normal retirement benefits by virtue of having 20 years of service also could not receive disability retirement benefits.

attributed to them for purposes of calculating the amount of disability retirement. When workers are disabled after they become eligible for normal retirement, they receive only normal retirement benefits. The amount of the yearly benefits is generally calculated as 2.5% of the employee's final compensation times the number of years worked. However, for employees who are not yet eligible for normal retirement (i.e., employees under age 55 and with fewer than 20 years of service), additional years are added to the number of years worked for purposes of the calculation. The number of years added is the number of years remaining until the worker *would have* reached either normal retirement age or twenty years of service, but no more than the number of years already worked.[2] The purpose

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[2] The statute provides:

> The disability retirement allowance shall be determined as provided in KRS 16.576, except if the member's total service credit on his last day of paid employment in a regular full-time position is less than twenty (20) years, service shall be added beginning with his last date of paid employment and continuing to his fifty-fifth birthday. The maximum service credit added shall not exceed the total service the member had on his last day of paid employment, and the maximum service credit for calculating his retirement allowance, including his total service and service added under this section, shall not exceed twenty (20) years.

Ky. Rev. Stat. § 16.582(5)(a) (Supp. 2004).

appears to be to give a disabled worker the amount of benefit he would have been entitled to had he worked until normal retirement, notwithstanding the fact that he had not actually worked those additional years.

Under this scheme, disability retirement benefits will often be greater than normal retirement benefits for employees with the same years of service (but less

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For instance, an employee who becomes disabled at age 45 with 10 years of service will be entitled to have his benefits calculated on the basis of 20 years of service, whereas an employee who becomes disabled at age 45 with 7 years of service will be entitled to have his benefits calculated on the basis of 14 years of service.

This text is from a version effective July 13, 2004, which varies only slightly from the prior version. Although the 2004 changes to subsection 5(a) were only cosmetic, an entirely new scheme of calculating disability retirement benefits was added as subsection 5(b) for employees "whose participation begins on or after August 1, 2004."

> For a member whose participation begins on or after August 1, 2004, the disability retirement allowance shall be the higher of twenty-five percent (25%) of the member's monthly final rate of pay or the retirement allowance determined in the same manner as for retirement at his normal retirement date with years of service and final compensation being determined as of the date of his disability.

Ky. Rev. Stat. § 16.582(5)(b) (Supp. 2004). The revised version is not at issue here.

than twenty years of service) and the same final compensation. The employee who receives normal retirement benefits will be entitled to 2.5% of his final compensation times his actual service years, whereas the employee who will receive disability retirement benefits will receive the same 2.5% of his final compensation, but will have it multiplied by a number that is higher than his actual years of service, leading to a higher benefit. Moreover, disability benefits will be greater for workers who become entitled to disability retirement at a younger age with the same number of years of service.

A chart prepared by the EEOC shows these discrepancies clearly.

Kentucky Retirement System Benefit to Hazardous Employee Disabled from Working

Age at Disability	*Final Pay*	*# Years Service*	*Multiplier*	*Annual Benefits*	*Monthly Payment*
55 or older	$50,000	10	10	$12,500	$1,041.66
53	$50,000	10	12	$15,000	$1,250.00
50	$50,000	10	15	$18,750	$1,562.50
48	$50,000	10	17	$21,250	$1,770.83
45 or younger	$50,000	10	20	$25,000	$2,083.33

This particular dispute between the EEOC and Kentucky Retirement arose out of an EEOC claim filed by Charles Lickteig, formerly a Deputy Sheriff for Jefferson County. In 1995, Lickteig, who was then 61 years old and had 17 years of service, applied for

disability retirement benefits from the County Employees' Retirement System. Lickteig was denied disability retirement benefits; the letter informing him of the decision stated that he was ineligible "since you are over age 55." In February 1996, Lickteig filed a charge with the EEOC. The EEOC conducted an investigation over the next two years, ultimately determining that the Kentucky Retirement System violated the ADEA. The EEOC, as required, attempted conciliation, but was not satisfied with Kentucky Retirement's proposed changes. On August 2, 1999, the EEOC filed suit in United States District Court for the Western District of Kentucky, alleging a violation of the ADEA. The defendants filed motions to dismiss, claiming immunity under the Tenth and Eleventh Amendments. The district court denied the motions, and the defendants sought interlocutory appeal to this court. A panel of this court held that the defendants were not entitled to immunity, with one exception. *EEOC v. Kentucky Retirement Systems,* Nos. 005664, 00-6366, 006367, 16 Fed. App'x 443, 453 (6th Cir. Aug. 2, 2001).[3]

On remand, both sides moved for summary judgment. The district court compared the Kentucky Retirement System plan to the early retirement plan in *Lyon v. Ohio Education Association and Professional Staff Union,* 53 F.3d 135 (6th Cir. 1995), and held that the EEOC "has failed to show how this

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[3] This court held that Kentucky was entitled to immunity under the Tenth Amendment with respect to the EEOC's attempt to seek a mandate that Kentucky enact permanent legislation. 16 Fed. App'x at 453.

retirement plan's age elements are discriminatory, either facially or through disparate treatment combined with intent." The EEOC filed a timely appeal.

II.

Affirmance is required because this case is not materially distinguishable from *Lyon v. Ohio Education Association and Professional Staff Union,* 53 F.3d 135 (6th Cir. 1995), in which we upheld an early retirement plan that attributed unworked years to younger workers in order to calculate benefits. At issue in *Lyon* was a retirement plan for employees of the Ohio Education Association ("OEA") that included an early retirement provision, called "Option B." Normal retirement was available to employees who had reached age 62 or had 32 years of service. 53 F.3d at 136. Early retirement was available to employees who had reached age 60 (with 5 years of service) or had 20 years of service. *Id.* Normal retirement benefits were calculated much as they are under the Kentucky Retirement System plan—an employee's years of service were multiplied by a fixed percentage of the employee's "average monthly compensation." *Id.* Early retirement benefits under Option B were also calculated much as disability retirement benefits are calculated under the Kentucky Retirement System plan—additional years of service were added to actual years of service so that it was as if the employee had worked until age 62. *Id.* For example, an employee who retired at age 56 with 21 years of service would receive credit for 27 years. *Id.* at 137. Just as in the Kentucky Retirement System plan, therefore, as between an older employee who retires under the

normal retirement plan, and a younger employee who retires under early retirement plan with the identical years of actual service and the same average monthly compensation, the older employee will receive less retirement benefits than the younger person. This court ultimately concluded "that plaintiffs have failed to advance a *prima facie* case of disparate-treatment or disparate-impact discrimination" and upheld the plan. *Id.*

This court in *Lyon* first explained the difference between disparate treatment and disparate impact.

> "'Disparate treatment' . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. . . .
>
> Claims of disparate treatment may be distinguished from claims that stress 'disparate impact.' The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive . . . is not required under a disparate-impact theory."

Id. at 138 (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n. 15 (1977) (citations omitted)). This court next turned to the most on-point

Supreme Court decision, *Hazen Paper Co. v. Biggins,* 507 U.S. 604 (1993). *See Lyon,* 53 F.3d at 138. The plaintiff in that case, Biggins, had been fired at age 62, several weeks before his pension benefits would have vested. 507 U.S. at 607. The Supreme Court was thus faced with the issue of "whether an employer violates the ADEA by acting on the basis of a factor, such as an employee's pension status or seniority, that is empirically correlated with age." *Id.* at 608. The Court, in holding that there was no discrimination, noted that "[i]n a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." *Id.* at 610. Accordingly, "[w]hatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait actually played a role in that process and had a determinative influence on the outcome." *Id.*

The *Lyon* court concluded that, under the reasoning of *Hazen Paper,* "the ADEA protects workers only from an employer who intended discrimination *because of* age." *Lyon,* 53 F. 3d at 138.

> "[T]he very essence of age discrimination [is] for an older employee to be fired because the employer believes that productivity and competence decline with age. [...] Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes."

Lyon, 53 F.3d at 138 *(quoting Hazen Paper Co.,* 507 U.S. at 610 (citation omitted)). The *Lyon* court

reasoned that the plaintiffs challenging Option B had not met the burden of showing intentional discrimination because of age.

> Plaintiffs have offered no facts that even hint at an improper motive in drafting or executing Option B by OEA or PSU. There was no evidence that either defendant intended Option B to discriminate against older employees. Nor have plaintiffs alleged that OEA or PSU was aware of a disparate effect on older employees, such that we could infer intent from knowledge. Plaintiffs state . . . in paragraphs ten and eleven of their complaint:
>
> > [Y]ounger employees who take an early retirement receive a greater pension amount than do older employees who retire with the same length of service.
> >
> > The effect of the practices complained of above . . . has been to deprive Plaintiff[s] . . . of equal employment opportunities and otherwise adversely affect their status as employees because of age, forty (40) or over.
>
> Complaint at 4. The absence of any reference to actions by OEA or PSU is telling.

Lyon, 53 F.3d at 139.

This court next rejected what it characterized as the plaintiffs' efforts "to cure their lack of evidence of *intent* by inferring discriminatory animus on the basis of the disparate *effect* on older workers." *Id.* First, the

court noted that if a plaintiff were permitted to use disparate effect to prove intent, the distinction between the disparate treatment and disparate impact theories of discrimination would be meaningless. *Id.* at 139-40. Second, this court in *Lyon* concluded that in fact Plan B did not have the effect of disadvantaging older workers *because of* age.

> Clearly, an employee who began work when older will have less time to accumulate years of service, and therefore will receive a lower benefit upon reaching 62, other things being equal; this is true under either early or normal retirement. . . . [T]he disparity that plaintiffs find objectionable is a product of their length of service and their age when originally hired by OEA. Thus, any disparity merely reflects the actuarial reality that employees who start work at an early age accumulate more years of service in reaching the normal retirement age of 62. . . .

Id. at 140. Ultimately, therefore, this court in *Lyon* concluded that the plaintiffs had failed to demonstrate a *prima facie* case of age discrimination, and affirmed the dismissal of their case. *Id.* at 140-41.

Because the retirement plan at issue in this case is materially indistinguishable from the early retirement incentive plan in *Lyon*, the Kentucky Retirement plan cannot be held to violate the ADEA. Under both plans, certain younger employees (those below the standard retirement age) are eligible to receive credit for additional years of service that they did not in fact work, with the result that a younger employee receives

greater retirement benefits than an older employee with the identical final or average salary and years of actual service. Although this case involves disability retirement benefits and *Lyon* involved early retirement benefits, that difference is not material.[4] Under *Lyon*, therefore, the EEOC has failed to demonstrate discriminatory intent, and Kentucky Retirement was entitled to summary judgment.

It is arguable that the application of the ADEA to benefit plans should be distinguished from the application of the ADEA to individual firings of the type at issue in *Hazen Paper*. Intent arguably should be inferred from the employer's knowledge concerning its own plan. Such an argument is, however, foreclosed by *Lyon*. The OEA retirement plan in *Lyon* explicitly used age to calculate benefits. Employees who retired before reaching age 62 received credit for the years remaining before age 62. Employees over age 62 were not entitled to credit years. Accordingly, there was disparate treatment because of age. This court commented in *Lyon* that "the absence of any reference to action *by* OEA or PSU is telling," 53 F.3d at 139, even though the only action that will ever be taken in cases involving retirement plans—as opposed to individual adverse actions—is the action of writing the policy.

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[4] Although a statutory exemption to the ADEA addresses early retirement incentive plans, *Lyon* explicitly declined to consider whether the exemption applied in that case. 53 F.3d at 137. At oral argument the EEOC repeatedly declined to argue that the *Lyon* result could be considered warranted by the statutory exception for early retirement incentive plans.

This court in *Lyon* could also perhaps be criticized for its reliance on the observation that "the very purpose of offering an early retirement *incentive* plan is to 'buy out' expensive workers." *Id.* Under a disparate treatment analysis, the presence of a justification for age discrimination does not, *ipso facto,* make that type of discrimination not actionable. Indeed, Congress's intent in enacting the Older Workers Benefit Protection Act ("OWBPA"), which amended the ADEA, appears to have been to make schemes such as the Kentucky Retirement System plan unlawful unless cost-justified. For instance, during the final debate on the Act, Rep. Roukema remarked as follows:

> The purpose of this legislation is to ensure that older workers do not receive less benefits than younger workers. . . . [T]he bill provides that workers who are on disability cannot be forced to receive only their pension at retirement age. Under this bill, they will receive the difference between what is typically a lower pension benefit and the higher disability benefit. The end result is that older workers will not find themselves penalized by virtue of their age and pension eligibility when it comes to receiving benefits.

136 Cong. Rec. H8614-02. Furthermore, the OWBPA was passed to overrule *Public Employees Retirement System of Ohio v. Betts,* 492 U.S. 158 (1989), which involved a retirement plan similar in many respects to the Kentucky Retirement System plan. The Public Employees Retirement System of Ohio ("PERS") provided both normal retirement benefits and

disability retirement benefits, and, as is true for the Kentucky Retirement System plan, an employee who had reached retirement age was ineligible for disability benefits. 492 U.S. at 162. The PERS system employed a different method of calculating benefits, but with a similar result: disability benefits were guaranteed to be no less than 30% of the disabled employee's final salary, whereas regular retirement benefits were not guaranteed. *Id.* at 163. In the case of the plaintiff Betts, who became disabled at age 61, one year after the 60-year retirement age, disability benefits would have been approximately double the amount of normal retirement benefits. *Id.* The Supreme Court did recognize that the PERS plan was facially discriminatory because it "renders covered employees ineligible for disability retirement once they have attained age 60," *id.* at 166, but concluded that an exception applied. The exception, section 4(f)(2) of the ADEA, 29 U.S.C. § 623(f)(2) (1988), provided that notwithstanding the general prohibition on the use of age to determine benefits, it was not unlawful for an employer

> to observe the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such . . . employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual.

29 U.S.C. § 623(f)(2) (1988); *see Betts*, 492 U.S. at 165-66. The remainder of the case was devoted to establishing the definition of "subterfuge," with the Court ultimately concluding that under the subterfuge provision, "the employee bears the burden of proving that the discriminatory plan provision actually was intended to serve the purpose of discriminating in some non-fringe-benefit aspect of the employment relation." *Id.* at 181. In short, the PERS plan would not be held to violate the ADEA, despite the fact that it based benefits on age, unless the plaintiff proved subterfuge.

Congress did not agree with the Supreme Court's interpretation of the ADEA, and accordingly, enacted the OWPBA to overrule *Betts*.

> The Congress finds that, as a result of the decision of the Supreme Court in *Public Employees Retirement System of Ohio v. Betts*, 109 S.Ct. 256 (1989), legislative action is necessary to restore the original congressional intent in passing and amending the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.), which was to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations.

Older Workers Benefit Protection Act, Pub. L. No. 101-433, 104 Stat. 978 (1990) (codified at 29 U.S.C. § 621). Congress thought that the plan in *Betts* violated the ADEA, unless it was cost-justified as provided for in a new, codified exception. The cost-justified exception is

not now at issue in this case—Kentucky Retirement has argued that its plan is cost-justified, but the district court declined to address the defense. The plan at issue in *Betts* rendered employees who had reached age 60 ineligible to receive disability benefits. The plan in this case, under the pre-2000 version, made employees who had reached age 55 ineligible to receive disability benefits. The post-2000 version is only one step removed from being in relevant respects identical: it limits the scope of the age discriminatory scheme to the pool of workers who have fewer than 20 years of service. If Congress thought that the plan in *Betts* violated the ADEA, then it could be argued that Congress would think that the Kentucky Retirement Systems plan violates the ADEA. The legislative history of the OWPBA was, however, available at the time that *Lyon* was decided, and therefore does not distinguish this case from *Lyon*.

Although the difficulties with the *Lyon* rationale and holding might warrant a different result in this case were the *Lyon* case not controlling in this circuit, such a different result would also have its troubling aspects. In *Lyon* the court identified an acceptable employer policy of paying more to buy out employees who were likely to stay on longer and thus cost the company more to keep on. If such a policy is acceptable under the ADEA, it follows that a policy of insuring against the employee's involuntary loss of such value is also acceptable. Assuming that each worker desires to accumulate a working-life's worth of retirement benefits, an employer might reasonably want to provide employees with assurance that such a "working life's worth" will be accumulated, against the risk that the employee will become disabled during his

or her period of employment. At oral argument, EEOC counsel was unable to articulate how, absent a scheme like Kentucky's, such a benefit could be provided without violating the ADEA.

III.

Because the use of age in the Kentucky Retirement System plan is indistinguishable from the use of age in the early retirement plan at issue in *Lyon*, the Kentucky Retirement System plan does not violate the ADEA. The judgment of the district court granting summary judgment in favor of Kentucky Retirement is affirmed.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 03-6437

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, — Plaintiff - Appellant

v.

JEFFERSON COUNTY SHERIFF'S DEPARTMENT, KENTUCKY RETIREMENT SYSTEMS, and COMMONWEALTH OF KENTUCKY. — Defendants - Appellees

Before: ROGERS and SUTTON, Circuit Judges; ROSEN, District Judge.

JUDGMENT

On Appeal from the United States District Court for the Western District of Kentucky at Louisville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk

RECOMMENDED FOR FULL-TEXT PUBLICATION

Pursuant to Sixth Circuit Rule 206
File Name: 06a0405p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellant,

v. No. 03-6437

JEFFERSON COUNTY SHERIFF'S DEPARTMENT, KENTUCKY RETIREMENT SYSTEMS, and the COMMONWEALTH OF KENTUCKY,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Kentucky at Louisville.
No. 99-00500—Jennifer B. Coffman, District Judge.

Argued: June 7, 2006

Decided and Filed: October 31, 2006

Before: BOGGS, Chief Judge; MARTIN, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, ROGERS, SUTTON, COOK, McKEAGUE, and GRIFFIN,
Circuit Judges.

COUNSEL

ARGUED: Dori K. Bernstein, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Appellant. Robert D. Klausner, KLAUSNER & KAUFMAN, Plantation, Florida, for Appellees. ON BRIEF: Dori K. Bernstein, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Washington, D.C., for Appellant. Robert D. Klausner, KLAUSNER & KAUFMAN, Plantation, Florida, Mitchell L. Perry, JEFFERSON COUNTY ATTORNEY'S OFFICE, Louisville, Kentucky, Lizbeth A. Tully, C. Joseph Beavin, James D. Allen, STOLL KEENON OGDEN, Lexington, Kentucky, D. Brent Irvin, OFFICE OF THE ATTORNEY GENERAL, Frankfort, Kentucky, for Appellees.

MOORE, J., delivered the opinion of the court, in which MARTIN, DAUGHTREY, COLE, CLAY, GIBBONS, SUTTON, COOK, and GRIFFIN, JJ., joined. ROGERS, J. (p. 12), delivered a separate opinion concurring in the result. BOGGS, C. J. (pp. 13-18), delivered a separate dissenting opinion, in which BATCHELDER, GILMAN, and McKEAGUE, JJ., joined.

OPINION

KAREN NELSON MOORE, Circuit Judge. Plaintiff-Appellant the Equal Employment

Opportunity Commission ("EEOC") brings this public-enforcement age-discrimination lawsuit against Defendants-Appellees the Jefferson County Sheriff's Department, the Kentucky Retirement Systems, and the Commonwealth of Kentucky (referred to collectively as "KRS"), alleging that KRS's disability-retirement-benefits plan for state and county employees violates the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, as amended by the Older Workers Benefit Protection Act ("OWBPA"), Pub. Law 101-433, 104 Stat. 978 (1990). The KRS disability-retirement-benefits plan (hereinafter "The KRS plan") disqualifies employees who are still working from receiving disability-retirement benefits if they have already reached normal retirement-benefit age at the time they become disabled. The KRS plan also calculates disability retirement benefits in such a way that an older employee who is eligible to receive disability benefits receives fewer benefits — in the form of lower monthly benefit payments — than a younger disabled employee receiving disability-retirement benefits who is similar to the older disabled employee in every relevant factor other than age.

Both the district court and the original panel of this court concluded that pursuant to *Lyon v. Ohio Education Association and Professional Staff Union,* 53 F.3d 135 (6th Cir. 1995), the EEOC had failed to establish a prima facie violation of the ADEA. *Lyon* concluded that a retirement plan that used age as a factor to determine benefits in a materially indistinguishable manner to the way that age is used in the KRS plan did not establish a prima facie violation of the ADEA despite the fact that older

workers received lower benefits because of their age. *Lyon* held that in addition to demonstrating disparate treatment on the basis of age, a plaintiff needed to produce evidence of discriminatory animus against older people in order to survive the employer's summary-judgment motion.

After reviewing the parties' arguments and the relevant law, we conclude that the EEOC has established a prima facie violation of the ADEA, because the KRS plan is facially discriminatory on the basis of age. Supreme Court authority on disparate-treatment-discrimination claims as well as the persuasive authority of many of the other circuits and the history of the ADEA (as amended by the OWBPA) demonstrate that KRS is not entitled to summary judgment. We further hold that when an employment policy or benefit plan such as the KRS plan is facially discriminatory, a plaintiff challenging that policy does not need additional proof of discriminatory animus in order to establish a prima facie disparate-treatment claim. Upon en banc review, we conclude that *Lyon's* standard for a disparate-treatment age-discrimination claim is inconsistent with Supreme Court authority as well as the rulings of several of our sister circuits in cases involving the similar role of age in employee-benefit plans. We therefore overrule in part our previous decision in *Lyon*.

Because we conclude that the EEOC has established a prima facie claim of age discrimination, we **REVERSE** the district court's grant of summary judgment to KRS on the EEOC's age-discrimination claim and **REMAND** the case to the district court for further proceedings consistent with this opinion.

I. BACKGROUND

The dispute that led to this lawsuit began when Charles Lickteig, who was at the time a Deputy Sheriff with the Jefferson County Sheriff's Department, was denied disability-retirement benefits under the KRS plan because of his age. Because Lickteig's job as a Deputy Sheriff was considered hazardous, Lickteig became eligible for normal retirement benefits at age 55,[1] but he chose to continue working past that date because he had school-age children to support. Joint Appendix ("J.A.") at 49 (Lickteig Aff. ¶ 11). In 1995, Lickteig, who had worked as a Deputy Sheriff since 1978, became disabled due to "a deteriorating vertebra[], arthritis, nerve damage, and Parkinson's disease" to the point that he could no longer perform his Deputy Sheriff duties. J.A. at 48 (Lickteig Aff. ¶¶ 4, 6). In July 1995, at age sixty-one and with seventeen years and seven months worth of service, Lickteig applied for disability-retirement benefits under the KRS plan. J.A. at 42 (William Hanes Aff. ¶ 3); J.A. at 49 (Lickteig Aff. ¶ 7). In a letter dated August 25, 1995, defendants notified Lickteig that his request for disability-retirement benefits had been

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[1] As the original panel of this court explained, under the KRS retirement system, "[a]n employee in a hazardous position is eligible to receive normal retirement benefits at age 55, or with twenty years of service, Ky. Rev. Stat. §§ 16.576, 16.577(2), 61.592(4), 78.545(31), whereas an employee in a nonhazardous position is eligible to receive normal retirement benefits at age 65. Ky. Rev. Stat. § 61.510(18)." *EEOC v. Jefferson County Sheriff's Dep't*, 424 F.3d 467, 469 (6th Cir. 2005), *vacated on grant of reh'g en banc* (2006).

denied because of his age. In its denial letter, KRS explained:

> Our laws state that you must have at least 60 months of service credit, be under age 55, and apply within 12 months of your last day of paid employment in a regular full-time position to qualify for Disability Retirement. Therefore, you are not eligible to apply for Disability Retirement since you are over age 55 and in a hazardous position.

J.A. at 51 (Lickteig Denial Letter). As a result of the denial of his request for disability-retirement benefits, Lickteig filed a charge of discrimination with the EEOC in February 1996, alleging that defendants illegally denied him the benefits because of his age. J.A. at 57-59 (EEOC Charges). The EEOC began investigating Lickteig's charges and eventually concluded that the KRS plan violated the ADEA.

The material aspects of the KRS plan are as follows. First, the KRS plan provides two types of retirement benefits — normal retirement benefits and disability-retirement benefits. Employees like Lickteig who work in hazardous positions are eligible for normal retirement benefits at age fifty-five or after completing twenty years of service, whereas an employee working in a nonhazardous position is eligible for normal retirement benefits at age sixty-five. The EEOC is not challenging the KRS plan provisions for normal retirement benefits for either class of employees, but rather only the plan's provision of disability-retirement benefits. As Lickteig is a hazardous-category employee, the district court and

the original hearing panel of our court analyzed only the disability-retirement plan's impact upon employees in hazardous positions, and we do the same. We note, however, that our holding is equally applicable to KRS's treatment of employees in nonhazardous positions to the extent that the disability-retirement plan utilizes age in a materially indistinguishable way in the provision of disability-retirement benefits to employees in nonhazardous positions.

The EEOC argues that the KRS plan's provisions of disability-retirement benefits violates the ADEA because the plan "denies benefits or pays reduced benefits, because of age." J.A. at 21 (Compl. at 1). As the original hearing panel of our court explained:

> The [KRS disability-retirement benefits] scheme appears to disadvantage older workers by virtue of the fact that a class of workers, determined in significant part by age (actually youth), gets unworked years attributed to them for purposes of calculating the amount of disability retirement. When workers are disabled after they become eligible for normal retirement, they receive only normal retirement benefits. The amount of the yearly benefits is generally calculated as 2.5% of the employee's final compensation times the number of years worked. However, for employees who are not yet eligible for normal retirement (i.e., employees under age 55 and with fewer than 20 years of service), additional years are added to the number of years worked for purposes of the calculation [of disability-retirement benefits]. The number of years added is the number of

> years remaining until the worker *would have* reached either normal retirement age or twenty years of service, but no more than the number of years already worked. The purpose appears to be to give a disabled worker the amount of benefit he would have been entitled to had he worked until normal retirement, notwithstanding the fact that he had not actually worked those additional years.
>
> Under this scheme, disability retirement benefits will often be greater than normal retirement benefits for employees with the same years of service (but less than twenty years of service) and the same final compensation. The employee who receives normal retirement benefits will be entitled to 2.5% of his final compensation times his actual service years, whereas the employee who will receive disability retirement benefits will receive the same 2.5% of his final compensation, but will have it multiplied by a number that is higher than his actual years of service, leading to a higher benefit. Moreover, disability benefits will be greater for workers who become entitled to disability retirement at a younger age with the same number of years of service.

EEOC v. Jefferson County Sheriff's Dep't, 424 F.3d 467, 469-70 (6th Cir. 2005) (footnotes omitted), *vacated on grant of reh'g en banc* (2006).

In addition, a hazardous-category employee eligible for the disability-retirement-benefit plan who is injured in the line of duty is guaranteed monthly

benefits of at least 25% of monthly final rate of pay, and if the employee has dependent children, she receives a dependent-child benefit of 10% of monthly final rate of pay for each child, up to a maximum for all dependent children of 40% of monthly final rate of pay. KY. REV. STAT. ANN. § 16.582(6). The parties do not dispute that an otherwise-identical employee who becomes disabled in the line of duty but because of her age at the time of disability is ineligible for disability-retirement benefits could not receive these additional dependent benefits.

The EEOC has provided charts demonstrating the impact of an employee's age on her disability-retirement-benefit amount in its brief. EEOC Br. at 14, 16. These charts illustrate, and defendants do not dispute, that:

> assuming every factor, other than age, that is relevant to determine an employee's benefits *(i.e.,* type of position, disabling condition, final compensation, and length of service) is identical, the amount paid annually to a worker who retires on disability at a younger age will frequently exceed (and will never be less than) the annual benefits of a worker who retires due to disability at an older age.

EEOC Br. at 16-17. Additionally, the EEOC argues, and defendants do not dispute, that:

> In every case, a worker younger than normal retirement age (55/65) who retires on disability will receive more benefits each year than an older employee who retires from the same job,

> with the same disabling condition, length of service, and final compensation, who becomes disabled after reaching 55/65 and must take normal retirement.

EEOC Br. at 16.

The EEOC challenges both the 1998 and the 2000 versions of the Kentucky statute governing the KRS plan.[2] *See* EEOC Br. at 7-8 (explaining challenged aspects of both the pre-2000 and 2000 versions of the KRS plan); *id.* at A-2 (excerpting portions of the pre-2000 and 2000 versions of the statute). The original panel explained the key differences between the 1998 and 2000 versions of the statute:

> Prior to July 2000, an employee was not eligible to receive disability retirement benefits unless he was "less than normal retirement age." Ky.Rev.Stat. § 16.582(2)(b)(1999), Ky.Rev.Stat. § 61.600(1)(b)(1999). After this litigation began,

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[2] We will therefore confine our analysis to the 1998 and 2000 versions of the statute. We note, however, that the Kentucky Legislature again revised the KRS plan in 2004. The 2004 revision retained the age-based eligibility requirements of the 2000 version, but altered the calculation of disability-retirement benefits. For members beginning to participate on or after August 1, 2004, disability-retirement pay is calculated to be "the higher of twenty-five percent (25%) of the member's monthly final rate of pay or the retirement allowance determined in the same manner as for retirement at his normal retirement date with years of service and final compensation being determined as of the date of his disability." KY. REV. STAT. ANN. § 16.582(5)(b).

> the provisions were amended, and currently provide that an employee is not eligible for retirement disability benefits if the employee is "eligible for an unreduced retirement allowance." Ky.Rev.Stat. § 16.582(2)(b) (2001) (effective July 14, 2000); *see* 2000 Ky. Acts 385, at *4. Under both versions, an employee who is 55 or older cannot receive disability retirement benefits. In addition, under the current version, an employee who became eligible to receive normal retirement benefits by virtue of having 20 years of service also could not receive disability retirement benefits.

EEOC v. Jefferson County, 424 F.3d at 469 n. 1. The EEOC explains that it is not challenging the exclusion of this latter group of employees — those rendered ineligible for disability-retirement benefits because of their years of service, rather than their age. The EEOC only "seeks relief for individuals who, because of age, were excluded from disability retirement, or applied for disability retirement and have received fewer annual benefits, since October 16, 1992," which is the enactment date of the OWBPA. EEOC Reply Br. at 27; *see also* EEOC Br. at 34.

In the fall of 1998, the EEOC and KRS attempted to conciliate this dispute, but the parties could not reach an agreement. J.A. at 60-62 (Marcia Hall-Craig Aff.). On August 2, 1999, the EEOC filed this lawsuit in the United States District Court for the Western District of Kentucky, alleging that the KRS plan illegally discriminates on the basis of age in violation of the ADEA. J.A. at 21-23 (Compl. ¶¶ 1-12). KRS filed a motion to dismiss the suit on Tenth and

Eleventh Amendment immunity grounds. After the district court denied defendants' motion to dismiss, a panel of our court affirmed that decision, holding that, with one exception, the Tenth and Eleventh Amendments do not shield KRS from the EEOC's age-discrimination suit. *EEOC v. Ky. Ret. Sys.*, 16 F. App'x 443, 453 (6th Cir. 2001). After the case was remanded to the district court, both the EEOC and KRS moved for summary judgment. The district court granted summary judgment for defendants, concluding that pursuant to our reasoning in *Lyon*, discriminatory intent was necessary to establish a prima facie case of age discrimination in a disparate-treatment claim. J.A. at 32-33 (Dist. Ct. Op. at 4-5). The district court recognized that intent could be inferred from a facially discriminatory policy, but found that the KRS plan was not facially discriminatory, and thus concluded that the EEOC had not alleged a valid disparate-treatment ADEA claim. The EEOC filed a timely notice of appeal.

Although suggesting concerns regarding the soundness of *Lyon's* reasoning, the original hearing panel of our court deemed itself bound by the *Lyon* decision and affirmed, holding that "[b]ecause the retirement plan at issue in this case is materially indistinguishable from the early retirement incentive plan [held to be consistent with the ADEA] in *Lyon*, the Kentucky Retirement plan cannot be held to violate the ADEA." *EEOC v. Jefferson County*, 121 F.3d at 473. The EEOC petitioned for rehearing en banc, arguing that the KRS plan is facially discriminatory, and that the Commission has therefore established a prima facie claim of age discrimination. The EEOC also urges us to overrule *Lyon* to the extent

that *Lyon* holds that a plaintiff challenging a facially discriminatory employment policy must have proof that the policy was motivated by discriminatory animus against older workers in order to state a prima facie violation of the ADEA.

II. ANALYSIS

We begin with a discussion of the origins of the ADEA, as the history of the Act informs our analysis of the issues raised in this case. Congress considered including age as a protected class when it was debating and drafting Title VII of the Civil Rights Act of 1964, but declined to do so because of concerns that employers might sometimes have a legitimate basis for making age-related employment decisions. *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 587-88 (2004). In order to determine whether Congressional action to address age discrimination was necessary and to understand better what type of legislation might remedy the existing problems, Congress requested that then-Secretary of Labor Willard Wirtz conduct "a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected." *Smith v. City of Jackson*, 544 U.S. 228, 232 (2005) (quoting Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 265 (1964)).

The Secretary of Labor's report, submitted to Congress in June 1965, concluded that age discrimination was sufficiently widespread that it warranted public concern, but that the nature of age discrimination was quite different from discrimination

based upon the classes protected by Title VII. U.S. SECRETARY OF LABOR, THE OLDER AMERICAN WORKER: AGE DISCRIMINATION IN EMPLOYMENT 5-6 (June 1965), *reprinted in* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT 22-23 (1981) (hereinafter "Wirtz Report"). "Because the ADEA was modeled on the Wirtz Report's findings and recommendations, the Report provides critical insights into the statute's meaning." *Smith,* 544 U.S. at 254 (O'Connor, J., concurring in the judgment). The Wirtz Report concluded "that there was little discrimination arising from dislike or intolerance of older people, but that 'arbitrary' discrimination did result from certain age limits." *Id.* at 232 (majority opinion). The Report stated that it had "found no evidence of prejudice based on dislike or intolerance of the older worker," and that "intolerance, of such overriding importance in the case of attitudes toward other groups, assumes minimal importance in the case of older people and older workers." Wirtz Report at 6. Despite finding a lack of discriminatory animus against older people, Secretary Wirtz found "substantial evidence of arbitrary" age discrimination. *Id.* at 5. Secretary Wirtz defined arbitrary[3] age discrimination as

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[3] The Supreme Court has largely adopted the Wirtz Report's definition of "arbitrary" age discrimination in its ADEA jurisprudence. In *General Dynamics Land Systems, Inc. v. Cline,* the Court stated that the ADEA's terms "arbitrary limits" and "arbitrary age discrimination" "are unmistakable references to the Wirtz Report's finding" that age ceilings in hiring were at the time widespread. 540 U.S. at 590. "The ADEA's ban on 'arbitrary

"assumptions about the effect of age on [an employee's] ability to do a job *when there is in fact no basis for these assumptions.*" *Id.* at 2. The Report explains that a common form of arbitrary age discrimination at that time was the refusal of employers to hire individuals for positions once they had reached a certain age, without any actual relevance to the particular position's job requirements. *Id.* at 6-8.

The Wirtz Report inspired Congress to request that the Secretary draft proposed legislation to combat age discrimination, and after that was completed, Congress "acted favorably on his proposal" and enacted the ADEA. *Smith,* 544 U.S. at 232-33. In 1967, Congress enacted the ADEA, which now renders it "unlawful for an employer (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;" as well as "(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age." 29 U.S.C. § 623(a)(1)-(2).

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limits' thus applies to age caps that exclude older applicants, necessarily to the advantage of younger ones." *Id.* Similarly, in her concurrence in *Smith v. City of Jackson,* Justice O'Connor read the Wirtz Report's definition of "arbitrary" as "clearly equat[ing] with disparate treatment" and as treatment on the basis of age that is "intentional and unfounded." *Smith,* 544 U.S. at 255 (O'Connor, J., concurring in the judgment).

In this case, the EEOC urges us to conclude that it has established a prima facie claim of age discrimination because the KRS plan facially discriminates against older employees in two ways: (1) the KRS plan renders employees ineligible for disability-retirement benefits simply because of their age, which means that disabled workers who are ineligible for disability benefits because of their age receive lower (normal) retirement benefits than otherwise-similar younger workers who become disabled and are able to receive the greater disability-retirement benefits, and (2) the KRS plan uses an employee's age in order to calculate disability-retirement benefits in such a way that an older eligible employee receives lower monthly disability-benefit payments than an otherwise-similar younger disabled worker.

Defendants argue that, contrary to the EEOC's assertion, the KRS plan does not violate the ADEA because the policy does not discriminate "because of age." KRS Br. at 10. Rather, defendants argue, the KRS plan merely uses age as one of several factors to determine benefits, in the same way that age is a factor in many, if not most, retirement-benefit plans. *See* KRS Br. at 13. Defendants also assert that a valid disparate-treatment claim requires a plaintiff to establish proof of discriminatory motive, and that "[t]here is no evidence that the [KRS plan] framework established to provide benefits to disabled members of Kentucky Retirement was in any fashion age-driven." KRS Br. at 26-27.

We consider first the EEOC's argument that it has established a prima facie ADEA claim because the

KRS disability-retirement-benefits plan is facially discriminatory. We then assess KRS's argument that even if the KRS plan is facially discriminatory, the EEOC must produce evidence that the plan was motivated by discriminatory animus against older people in order to sustain its prima facie burden.

A. The EEOC Has Established a Prima Facie ADEA Claim Because the KRS Plan Facially Discriminates on the Basis of Age

The Supreme Court has made clear that an employer's reliance "upon a formal, facially discriminatory policy requiring adverse treatment of employees with that [protected] trait" establishes a prima facie disparate-treatment claim under the ADEA. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (citing *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985)). In *Thurston*, the plaintiffs were pilots who became disqualified to continue serving in the position of captain when they reached age sixty. Unlike individuals who became disqualified from serving as captain for reasons other than age, the plaintiffs were not granted the privilege of automatically transferring to the position of flight engineer. Instead, former captains who became disqualified from continuing in the position of captain because of their age could obtain only a flight engineer position if they were successful in a bidding process.

A unanimous Court stated that even though the airline was not required to provide transfer privileges to any disqualified captains, "if TWA does grant some disqualified captains the 'privilege' of 'bumping' less senior flight engineers, it may not deny this

opportunity to others because of their age." *Thurston*, 469 U.S. at 120-21. *Thurston* held that the plaintiffs had established a prima facie case of age discrimination because "there is direct evidence that the method of transfer available to a disqualified captain depends upon [the captain's] age. Since it allows captains who become disqualified for any reason other than age to 'bump' less senior flight engineers, TWA's transfer policy is discriminatory on its face." *Id.* at 121. *See also City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 715-16 (1978) (finding facial sex discrimination in violation of Title VII where female employees are required to make larger pension contributions than their male counterparts).[4]

When we apply the definition of facial discrimination established by the Court in *Hazen Paper, Thurston,* and *Manhart* to the present dispute, it is apparent that the KRS plan is facially discriminatory on the basis of age in at least two ways. First, like the transfer plan in *Thurston,* the KRS plan categorically excludes still-working employees over age fifty-five from a particular employment benefit *because of* their age. In order to be eligible for disability-retirement benefits, employees in hazardous positions

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[4] Interestingly, the Supreme Court *in Manhart* rejected the defendant's argument that plaintiffs must produce actuarial evidence that the facially discriminatory policy actually had a discriminatory effect on women as a class, and held that the absence of this effect-evidence did not defeat plaintiffs' successful disparate-treatment claim based upon the facially discriminatory nature of the policy. *Manhart*, 435 U.S. at 716.

must become disabled before they reach age fifty-five. There is absolutely no dispute that under the KRS plan, when such an employee becomes disabled at age fifty-five or older, that older employee is adversely treated because of his or her age when compared to a disabled coworker who is similarly situated in all relevant aspects other than age. On its face, this age-eligibility aspect of the KRS plan mandates disparate treatment of disabled employees on the basis of age. Defendants' decision to render employees in hazardous positions ineligible for disability-retirement benefits simply because they have reached normal retirement age is "a formal, facially discriminatory policy" that discriminates on the basis of age, which is sufficient to establish a prima facie ADEA violation. *Hazen Paper,* 507 U.S. at 610.

The KRS plan is facially discriminatory in a second way, in that KRS employees who become disabled when they are still "young enough" to be eligible for disability-retirement benefits receive reduced benefits compared to otherwise-similar but even younger disabled employees for no reason other than their age. KRS does not dispute that its plan pays lower disability-retirement benefits to an older worker who, apart from age, is similarly situated to a younger worker in all relevant respects. An employee's age, therefore, "actually play[s] a role in" and has "a determinative influence on the outcome" of the amount a disabled employee's disability-retirement-benefit payment is each month. *Hazen Paper,* 507 U.S. at 610. This is a second way that the KRS plan, on its face, requires disparate treatment on the basis of age. *See id.* at 609 (stating that disparate treatment occurs when "[t]he employer simply treats some people less

favorably than others because of their" protected trait) (quoting *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977)).

The district court's conclusion, compelled by *Lyon*,[5] that the KRS plan does not facially discriminate on the basis of age is also contrary to the Supreme Court's analysis in *Public Employees Retirement System of Ohio v. Betts*, 492 U.S. 158 (1989). The KRS plan's disqualification of employees age fifty-five and over for disability benefits closely resembles the characteristic of the plan in *Betts* that the Supreme Court found to be facially discriminatory. *See id.* at 166 (finding that "[o]n its face, the [employee benefit] scheme renders covered employees ineligible for disability retirement once they have attained age 60," but holding that the employer met an exemption under the ADEA because plaintiffs did not provide evidence of "subterfuge"). In response to *Betts*, Congress promptly amended the ADEA to remove the need for proof of subterfuge and to clarify its intent "to prohibit discrimination against older workers in all employee benefits except when age-based reductions in employee benefit plans are

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[5] Although *Lyon* involved a challenge to the use of age in the determination of the amount of early retirement benefits, we agree with the original hearing panel in this case that the role that age played in the plan at issue in *Lyon* "is not materially distinguishable" from the role that age plays in the KRS plan. *EEOC v. Jefferson County*, 424 F.3d at 471. Both plans compute the disputed benefits in such a way that the employee's age is the determinative factor in the calculation of the benefit amount, with an older employee receiving lower benefits than an otherwise-similar younger employee. *Id.*

justified by significant cost considerations." Older Workers Benefit Protection Act ("OWBPA"), Pub. Law 101-433, § 101, 104 Stat. 978 (1990) (codified at 29 U.S.C. § 621).

The original panel in this case considered *Betts* and the legislative history of the OWBPA. *EEOC v. Jefferson County*, 424 F.3d at 474-75. Nevertheless, the original panel ultimately determined that it was unable to distinguish *Lyon* on that ground because the same legislative material was available to the *Lyon* panel. *Id.* (citing, *inter alia*, excerpts of the final debate about the OWBPA stating that "[t]he bill provides that workers who are on disability cannot be forced to receive only their pension at retirement age" and that under the OWBPA, "they will receive the difference between what is typically a lower pension benefit and the higher disability benefit"). We believe that this legislative history is compelling evidence that when revising the ADEA in response to *Betts*, Congress intended to prohibit the very sort of age-based discrimination that the original panel, bound by *Lyon*, condoned in this plan.

That many of our sister circuits have reached conclusions contrary to *Lyon* lends further support for our conclusion that *Lyon's* definition of a prima facie ADEA claim can no longer stand. Since *Lyon* was decided, the Second, Seventh, Eighth, and Ninth Circuits have each recognized a prima facie ADEA violation in analogous situations. *See Jankovitz v. Des Moines Indep. Cmty. Sch. Dist.*, 421 F.3d 649, 653 (8th Cir. 2005) (stating that a retirement plan is "discriminatory on its face" because "it is undisputed that an employee is ineligible for early retirement

benefits [under the plan] if he or she is over the age of 65"); *Abrahamson v. Bd. of Educ. of Wappingers Falls Cent. Sch. Dist.*, 374 F.3d 66, 73 (2d Cir. 2004) (finding prima facie case of age discrimination under ADEA when age "is the effective trigger for eligibility" for retirement policy); *Arnett v. Cal. Pub. Employees Ret. Sys.*, 179 F.3d 690, 695 (9th Cir. 1999) (recognizing prima facie disparate-treatment claim when it "is unquestionable that the [e]mployees would have received greater disability retirement benefits but for their older ages at hire"), *cert. granted*, 528 U.S. 1111, *vacated on other grounds by Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000); *Huff v. UARCO, Inc.*, 122 F.3d 374, 387-88 (7th Cir. 1997) (finding employer not entitled to summary judgment on disparate-treatment claim because the early retirement policy "draws an express line between workers over fifty-five and those under").

We conclude that the KRS plan is facially discriminatory on the basis of age, and thus we hold that the EEOC has established a prima facie violation of the ADEA.

B. The EEOC Need Not Provide Additional Proof of Discriminatory Animus, As Discriminatory Intent Is Evidenced by the Facially Discriminatory Nature of the KRS Plan

KRS argues that defendants are entitled to summary judgment because the EEOC has not provided any proof that KRS enacted the disability-retirement-benefits plan because of a discriminatory animus against older workers. Unfortunately for KRS, this argument runs contrary to Supreme Court

authority and the history and purpose of the ADEA. Once a plaintiff has established that a policy is facially discriminatory in that it classifies or disadvantages an employee "because of" the employee's protected status, additional proof of discriminatory intent is not needed, as it is directly evidenced by the facially discriminatory nature of the policy itself. As the Supreme Court held *in Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991), a plaintiff who has identified a facially discriminatory employment policy need not provide evidence of discriminatory animus to prevail on a disparate-treatment claim. *Johnson Controls* explained:

> [T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect. Whether an employment practice involves disparate treatment through explicit facial discrimination does not depend on why the employer discriminates but rather on the explicit terms of the discrimination.

The Supreme Court reaffirmed this approach in *Hazen Paper,* stating that evidence of intent to discriminate necessary for a disparate-treatment claim "can in some situations be inferred from the mere fact of differences in treatment." 507 U.S. at 609 (internal quotation marks omitted). *See also Jankovitz,* 421 F.3d at 653 (concluding that because retirement plan is facially discriminatory on the basis of age, "intent to discriminate can be presumed"); *Massarsky v. Gen. Motors Corp.*, 706 F.2d 111, 119 (3d Cir. 1983) (stating that "where an employer's policy or practice is discriminatory on its face, it is unnecessary for the

plaintiff to make a separate showing of intent to discriminate.")

As it was bound by *Johnson Controls* and *Hazen Paper*, the *Lyon* panel at one point correctly recognized that intent to discriminate can be inferred from a defendant's knowledge of a disparate effect. *See Lyon*, 53 F.3d at 139 (stating that plaintiffs have not "alleged that [defendants were] aware of a disparate effect on older employees, such that we could infer intent from knowledge."). *Lyon* later uses language, however, that contradicts not only this earlier recognition but also the above Supreme Court precedent.[6] *See id.*

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[6] The language in *Hazen Paper* upon which defendants, the district court, and the panel in *Lyon* appear to rely for their belief that additional proof of discriminatory motive is required is *Hazen Paper's* statement that "a disparate treatment claim cannot succeed unless the employee's protected trait *actually played a role in* [the employer's decision-making process] and had a determinative influence on the outcome." *Hazen Paper*, 507 U.S. at 610 (emphasis added). A closer analysis of *Hazen Paper* belies defendants' argument. Immediately before making this statement, the Court *in Hazen Paper* gave examples of ways in which the protected trait could actually motivate an employer's decision and therefore constitute disparate treatment. With citations to its previous decisions in *Thurston* and *Manhart*, the Court gave as its first example "a formal, facially discriminatory policy requiring adverse treatment of employees with that [protected] trait." *Id.* It is therefore evident that the *Hazen Paper* language that defendants and *Lyon* cling to in an attempt to argue that *Hazen Paper* added an additional requirement of discriminatory animus was simply the Court's summary statement to describe the various circumstances that can

("Plaintiffs try to cure their lack of evidence of *intent* by inferring discriminatory animus on the basis of a disparate *effect* on older workers. This is circular, and would render meaningless the carefully-wrought distinction between disparate-impact and disparate-treatment theories of discrimination . . . . "). The original hearing panel in this case suggested persuasively that discriminatory "[i]ntent arguably should be inferred from the employer's knowledge concerning its own [retirement] plan," but continued that "[s]uch an argument is, however, foreclosed by *Lyon*." *EEOC v. Jefferson County*, 424 F.3d at 473. The panel continued in its criticism of *Lyon*, explaining why *Lyon's* requirement that a plaintiff alleging disparate treatment must produce additional evidence of a defendant's discriminatory animus where the challenged employment action consists of a benefits plan is misguided because "the only action that will ever be taken in cases involving retirement plans—as opposed to individual adverse actions—is the action of writing the policy." *Id.* We agree, and we hold that an employer's intent to discriminate is directly evidenced by the employer's writing or adoption of a facially discriminatory employment policy.

Finally, KRS's argument that the only disparate treatment on the basis of age that the ADEA was designed to remedy is disparate treatment motivated by discriminatory animus against the old is nonsensical considering the origins of the ADEA. The Wirtz Report, which inspired Congress to enact the

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constitute intentional action sufficient to support a viable disparate-treatment claim.

ADEA, found "no evidence of prejudice based on dislike or intolerance of the older worker." Wirtz Report at 6. Despite the absence of discriminatory animus against older workers, Congress enacted the ADEA to fight arbitrary age discrimination, which Secretary Wirtz defined as age-based assumptions that lacked a basis in fact. *Id.* at 2. Thus for KRS's interpretation of the Act to be correct, it would mean that in passing the ADEA, Congress intended to prohibit only a type of age discrimination that it had been advised did not exist. We will not interpret the ADEA so narrowly and illogically.

There is simply no dispute that under the KRS plan, an employee's age actually plays a role in the defendants' decision-making process about what amount, if any, of disability-retirement benefits an employee receives, and that age therefore has a "determinative influence on the outcome" for the disabled older employee. *Hazen Paper,* 507 U.S. at 610. The KRS plan excludes hazardous-category employees age fifty-five and over from receiving disability-retirement benefits, and pays reduced benefits to older eligible disabled workers compared to their younger counterparts because of their age. The EEOC has established a prima facie ADEA claim.

III. CONCLUSION

The EEOC has established a prima facie case of age discrimination because it has demonstrated that the KRS plan facially discriminates on the basis of age. No evidence of discriminatory animus is needed, as intent to discriminate on the basis of age is directly evidenced by the facially discriminatory nature of the KRS plan.

We **REVERSE** the district court's grant of summary judgment to defendants and **REMAND** to the district court for further proceedings consistent with this opinion.

CONCURRENCE

ROGERS, J., concurring separately. I concur in the result, generally for the reasons expressed in the majority opinion. The following four concerns, however, prevent my concurring in that opinion.

First, the retirement plans at issue in this case discriminate in only one way rather than two. The majority's description of the first way in which the KRS plan discriminates is significant only as it constitutes a part of the second way. That is, it is not facial discrimination to give older workers one kind of retirement plan and younger workers the same plan with a different name. The only real difference between disability retirement and normal retirement is the one caused by the "second" discriminatory characteristic. That is, if the retirement plans were called by the same name, there would be no age discrimination other than that arising from the attribution of unworked years (or more unworked years) based on age. If that discrimination were cured, on the other hand, the "first" way in which the KRS plan discriminates would be semantic only.

Second, in my view it is unnecessary for the en banc court to characterize the panel opinion's

treatment of our court's opinion in *Lyon*. The panel opinion, available as it is in the Federal Reporter, speaks for itself, and in any event the panel opinion has been vacated.

Third, it is only necessary for us to overrule *Lyon* to the extent that *Lyon* is inconsistent with our en banc holding and reasoning. I would leave to future litigants the task of going through *Lyon* and identifying what survives and what does not.

Finally, we should make clear that in this case we take no position on whether the result in *Lyon* can be supported by the early retirement exception to ADEA liability, 29 U.S.C. § 623(f)(2)(B)(ii). The district court in *Lyon* granted summary judgment in favor of the defendants after finding that the plaintiffs had failed to establish a prima facie disparate-treatment claim and, alternatively, that the retirement plan at issue constituted a lawful early retirement incentive plan pursuant to § 623(f)(2)(B)(ii). 53 F.3d at 137. Our court in *Lyon* did not reach the latter issue because it agreed with the district court regarding the plaintiffs' prima facie case. *Id.*

DISSENT

BOGGS, Chief Judge, dissenting. The majority concludes that the disability-retirement plan of the Jefferson County Sheriff's Department, Kentucky Retirement Systems, and the Commonwealth of Kentucky (collectively referred to as "KRS") amounts

to a facial violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 621 *et seq.*, as amended by the Older Workers Benefits Protection Act ("OWBPA"), P. Law 101-433, 104 Stat. 978 (1990). I believe that a careful examination of the plan shows that it considers age only in combination with years of service and years to retirement age, and is a non-discriminatory way of providing workers with protection against disability before they have had an opportunity to earn a normal pension at retirement age. It therefore is not illegal under the Supreme Court's precedent in *Hazen Paper Co. v. Biggins,* 507 U.S. 604 (1993), and I respectfully dissent.

Congress stated that the purpose of the ADEA is to "promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b). 29 U.S.C. § 623(a)(1) prohibits an employer from, *inter alia,* "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."[1]

The Supreme Court has noted that the ADEA "broadly prohibits arbitrary discrimination in the workplace based on age." *Trans World Airlines, Inc. v.*

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[1] "'[C]ompensation, terms, conditions, or privileges of employment' encompasses all employee benefits, including such benefits provided pursuant to a bona fide employee benefit plan." 29 U.S.C. § 630(l).

Thurston, 469 U.S. 111, 120 (1985) (internal quotation marks and citation omitted). In discussing the ADEA in *Hazen Paper,* the Supreme Court emphasized the distinction between the disparate treatment and disparate impact theories of employment discrimination. 507 U.S. at 609. The Court stated that under a disparate treatment theory, "[t]he employer simply treats some people less favorably than others because of their race, color, religion [or other protected characteristics.] Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment . . ." *Ibid.* (second alteration and ellipsis in original) (internal quotation marks omitted) (quoting *Teamsters v. United States,* 431 U.S. 324, 335-36 n. 15 (1977)).

The Court continued that "[i]n a disparate treatment case, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." *Hazen Paper,* 507 U.S. at 610. The employer "may have relied upon a formal, facially discriminatory policy requiring adverse treatment of employees with that trait," *ibid.* (citing *Thurston, supra,* and *Los Angeles Dep't of Water & Power v. Manhart,* 435 U.S. 702, 704-18 (1978)), or "may have been motivated by the protected trait on an ad hoc, informal basis." *Ibid.* "Whatever the employer's decisionmaking process," the Court noted, "a disparate treatment claim cannot succeed unless the employee's *protected trait actually played* a role in that process and *had a determinative influence on the outcome.*" *Ibid.* (emphases added).

Defined in that way, the Court added, disparate treatment "captures the essence of what Congress sought to prohibit in the ADEA. It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age." *Ibid.* "Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes." *Ibid.* This type of stereotyping is nowhere found in the plan under consideration today.

In *Hazen Paper,* the Court addressed the question of whether an employer's firing an employee whose pension was shortly to vest violated the ADEA where the vesting of the pension was based exclusively on years of service. The Court held that although pension status is typically correlated with age, and although it is perhaps true that "older employees of Hazen Paper are more likely to be 'close to vesting' than younger employees," age and years of service were nevertheless analytically distinct. If the employer fired the employee because of pension status, not because of age, "[t]he prohibited stereotype ('Older employees are likely to be _____') would not have figured in this decision, and the attendant stigma would not ensue." Such conduct would not violate the ADEA, the Court held. 507 U.S. at 611-12. (The Court ultimately remanded for a determination of whether the firing had in fact been based on age rather than on years of service. *Id.* at 613.) In short, the Supreme Court held that, under the ADEA, companies could make a decision based solely on the need to save money, even if that decision bore more heavily, on average, on older

workers, so long as the factor relied on was only correlated with age, not determined by age. In our case, with much less base motives, the KRS plan is impacted by age only in relation to years of service and years remaining until normal retirement age, as shown by the examples given on pages 16 and 17, *infra*.

Thurston, an ADEA case cited by the Supreme Court in *Hazen Paper* as one in which the employer's formal, facially discriminatory policy showed intent to discriminate against older employees because of their age, fits comfortably within the "very essence" of the ADEA as discussed by the Court in *Hazen Paper*. In *Thurston*, TWA had adopted a policy by which captains who were disqualified from serving in that capacity for reasons other than age were allowed to transfer to the position of flight engineer, and in the process to "bump" less senior flight engineers. Pilots who were going to be disqualified from continuing to serve as captains because they had reached the age of 60, however, had to resort to bidding procedures in order to become a flight engineer, and if the procedures did not result in a flight engineer position, the captain had to retire at 60. 469 U.S. at 115-17, 120. Under the TWA policy, the following results would obtain. Captain A is disqualified from continuing to serve as captain because he is found to be incompetent. Captain B is nearing age 60. They are otherwise similarly situated. Captain A is allowed to transfer to the position of flight engineer and bump less-senior flight engineers in the process, *id.* at 117; Captain B is not. The Court found that the policy, under which "the method of transfer available to a disqualified captain depends upon his age," was "discriminatory on its face," and therefore amounted to direct evidence of age

discrimination in violation of the ADEA. *Id.* at 121-22. The *Thurston* case is thus an example of a forbidden policy that, in fact, implicates a stigmatizing and inaccurate stereotype—that pilots over age 60 are less capable, or at least less valuable as employees, even than younger workers who have been relieved for incompetence.

TWA's policy clearly embodied the "essence" of what the ADEA sought to prohibit—that is, arbitrary age discrimination. That is not the case with the KRS disability-retirement plan, nor was it the case with the early-retirement policy in *Lyon v. Ohio Education Ass'n and Prof'l Staff Union,* 53 F.3d 135 (6th Cir. 1995). Here, and in *Lyon,* no such stereotype is implicated.

The majority contends that there are two ways in which the KRS plan facially discriminates against older employees. First, workers with less than 20 years of service time (for employees in hazardous positions[2]) who become disabled before a certain age (in the case of employees in hazardous positions, 55) receive additional credit toward retirement, while those over normal retirement age do not receive additional credits (that is, their years to normal retirement age is zero). Second, a disabled worker with fewer years remaining until retirement age may receive fewer additional credits than a worker with

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[2] I follow the convention of the parties, the original panel, and the majority of this en banc court, by referring to the KRS plan for employees in hazardous positions, although the analysis applies to the plan for employees in nonhazardous positions as well.

more years remaining.[3] But the calculations for determining disability benefits for workers who become disabled under age 55 and for normal retirement benefits for those over age 55 are the same, with the exception of the imputed years added to the former's service time.

The original panel succinctly describes how the KRS plan works:

> When workers are disabled after they become eligible for normal retirement, they receive only normal retirement benefits. The amount of the yearly benefits is generally calculated as 2.5% of the employee's final compensation times the number of years worked. However, for employees who are not yet eligible for normal retirement (i.e., employees under age 55 and with fewer than 20 years of service), additional years are added to the number of years worked for purposes of the calculation. The number of years added is the number of years remaining until the worker *would have* reached either normal retirement age or twenty years of

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[3] "*May* receive" for two reasons: first, as shown below at pages 16 and 17, a younger worker may only need the same number of years for maximum benefits as an older worker (e.g., in the case of a 40-year-old with 15 years of service and a 50-year-old with 15 years of service), and second, additional credit is limited to the number of years already worked. Thus, a 49-year-old with six service years and a 40-year-old with six service years will each get the same benefit—six additional years of credit.

> service, but no more than the number of years already worked.

EEOC v. Jefferson County Sheriff's Dep't, 424 F.3d 467, 469 (6th Cir. 2005) (footnote omitted), *vacated on grant of reh'g en banc*, 2006 U.S. App. LEXIS 258 (6th Cir. Jan. 4, 2006). The majority argues that because older employees with, e.g., 10 years of service and final pay of $50,000 receive fewer benefits than younger employees with the same years of service and final pay, the KRS plan is facially discriminatory. Yet the majority misses the point that a 53-year-old employee who becomes disabled is not similarly situated to a 33-year-old employee who becomes disabled, even if they have the same service years and final pay at the time of disability. All else being equal, the non-disabled 33-year-old of course has more years to work and live than does a non-disabled 55-year-old. *See Lyon*, 53 F.3d at 137, 140-41 (explaining that an early-retirement plan that "ensure[s] early retirees the same benefits that they would have received had they continued to work until their normal retirement date" did not pay older workers lower benefits *because of age;* two employees of different ages but equal years of service are not similarly situated). Here, the number of years of additional work credit lost is a factor related to, but not determined by, age.

In *Public Employees Retirement System v. Betts*, 492 U.S. 158 (1989), the Supreme Court confronted a disability-retirement plan that provided age-and-service retirement benefits to those who retired over a certain age (for Betts, the plaintiff, the retirement age was 60) and had a certain number of service years, or to those under the age who had served a set higher

number of years. The plan also provided disability benefits to those under the retirement age who had served a certain number of years and suffered a disability. 492 U.S. at 162. The scheme in *Betts* provided that disability payments would constitute not less than 30% of the disability retiree's final average salary; no such floor existed for age-and-service retirees. Betts became disabled at age 61, and therefore was unable to receive disability benefits. She received in age-and-service benefits just over half what she would have received in disability. *Id.* at 163.

The Supreme Court stated that "[o]n its face, the . . . scheme renders covered employees ineligible for disability retirement once they have attained age 60." Yet the Court found that the scheme did not violate the ADEA because it fit under the then-existing provision of 29 U.S.C. § 623(f)(2) that exempted age-based decisions taken pursuant to the terms of "any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of" the ADEA. *Id.* at 161-62, 166. A year after the Supreme Court's decision in *Betts,* Congress passed the OWBPA, amending the ADEA. The OWBPA included a finding that "as a result of [*Betts*], legislative action is necessary to restore the original congressional intent in passing and amending the [ADEA], which was to prohibit discrimination against older workers in all employment benefits except when age-based reductions in employee benefit plans are justified by significant cost considerations." OWBPA, Pub. L. No. 101-433, § 101, 104 Stat. 978 (1990) (codified at 29 U.S.C. § 621 note).

In contradistinction to the plan at issue in *Betts*, the case the OWBPA was designed to overturn, the KRS plan does not provide younger workers with a specific benefit unavailable to older workers. In *Betts*, the crucial distinction was that a "disability" retirement gave a worker a guaranteed minimum income of 30% of the worker's final salary. Betts was disqualified from receiving that benefit solely on the basis of age, though she was qualified in every other respect. *Betts*, 492 U.S. at 162-63.

Under the KRS plan, a "disability" retirement is intrinsically no different from the "normal" retirement pension available to every worker. Benefits are based on years of credited service (augmented to a maximum of 20 for disabled workers ineligible for normal retirement), multiplied by a factor related to final salary. If "normal" benefits are greater than the augmented benefits for disability, of course, the greater benefits are provided. The plan simply provides that a worker who is disabled before reaching eligibility for normal retirement benefits has a way of receiving a retirement benefit equal to (or closer to) what he would have received had he not become disabled before reaching the normal retirement age or 20 years of service.

This is a very reasonable benefit, and one that a younger worker, in particular, would be more likely to value more highly than a newly-hired older worker, who would be more likely to have acquired other benefits from more extensive earlier employment. The extensive questioning by this court at oral argument, attempting to probe for a way to provide this sensible result under the appellants' reasoning, shows that we

should not be too quick to assume that Congress intended, or commanded by the language it wrote, that such a reasonable plan was being outlawed.

It is worth repeating that the plaintiff here, Mr. Lickteig, is already eligible for "normal" retirement benefits, based on his 17 years of service and his having attained the normal retirement age (55 for employees in hazardous jobs). What he (or rather, what the EEOC on his behalf) is attempting to do in this suit is to prevent employees who have been granted a form of insurance against disability at a pre-retirement age from obtaining that benefit.

Several examples show how the KRS plan does not differentiate based on age, but on age only in relation to years of service.

1) Take two employees of the same age. One is 48 with 10 years of service, the other is 48 with 15 years of service. They both become disabled. The first employee gets 7 years of extra credit, which takes him to age 55, and the second gets 5 years of extra credit, which takes him to 20 years of service, but in each case it is as if the employee had worked until eligible for normal retirement.

2) Take two employees with the same service. One is 50 with 15 years of service. The second is 35 with 15 years of service. They both become disabled. They each get exactly the same additional credit - 5 years - despite the difference in their ages, and with that additional credit, it is as if each had worked until eligible for normal retirement.

3) Take two employees with differing ages and years of service. The first is 45 with 10 years of service. The second is 40 with 17 years of service. They both become disabled. This time, the older worker actually gets a greater benefit because he will get credit for all of the 10 years that would bring him to the retirement age, whereas the younger worker will "max out" at the full 20 years of credit with only an additional 3 years of credit.

These examples demonstrate starkly that age is not a controlling variable in the operation of the KRS plan. They also show that the plan provides in practice exactly what was claimed for it by appellees' counsel in the argument before us: a way to insure against disability that is sensitive to the greatest loss caused by disability—the inability to continue earning credits toward retirement at a normal retirement age.

Many life insurance policies have a feature that if premiums are paid from the inception of the policy to age 65, no further premium payments are required. Some also have a feature called "disability waiver of premiums": if the policy holder becomes disabled, the insurance company will no longer collect premiums, in effect crediting the policyholder as though those premiums are being paid. Yet, on average, such a disability feature (which no one would contend constitutes age discrimination) works exactly like the KRS plan. The waiver feature is worth more to the person who is disabled at 40 than one who is disabled at 60, because, on average, the waiver is in effect for many more years. And one who is disabled after 65 receives no benefit at all, as the premium is already fully paid up.

It is undisputed, and patently obvious from the nature of the KRS plan, that both the rationale and the effect of that plan is to insure that all employees have a reasonable prospect of employer-sponsored insurance against a disability that occurs before retirement income becomes available. On average, if employee A is younger than employee B and both suffer the same disability at the same time, A 1) will have had less time to earn money and retirement credit, and 2) will have more years to live. The KRS plan is meant to, and does, ameliorate exactly the ways in which A and B are not similarly situated, by providing A with a "bonus" for the circumstances of the disability. That "bonus" depends on years of service and years to normal retirement age. The bonus will often, but not always, be larger for a younger worker than an older one. As the examples show, the bonus provided to employees who become disabled can vary from no additional credit to as much as 10 years' credit, in a fashion that may be correlated (just as pension status in *Hazen Paper* was correlated) with age, but far from perfectly.

The KRS plan has nothing whatever to do with "inaccurate and stigmatizing stereotypes" surrounding the relative ability of older employees to do the job—that is to say, Congress's reason for enacting the ADEA, as the discussion above and the majority's own analysis of the legislative history indicate (Maj. Op. pp. 6—7). There is no intimation in any part of the KRS plan of any demeaning or inappropriate stereotyping of older workers. All employees who are considered disabled under the KRS plan are equally unable to do their jobs—because of disability. The only factor resembling consideration of the nature of aging

that counsel for appellants could adduce at oral argument was that some older employees might wish to work beyond normal retirement age (55 for hazardous employees, 65 for nonhazardous employees). But that does not differentiate between workers who are now more advanced in years and those younger. All such workers may wish to (and, had they not become disabled, might have been able to) work beyond that normal retirement age. But any retirement plan must have criteria for qualification, and using age as one of the criteria has never been thought to violate the ADEA. If KRS changed the plan to have a later retirement age, the mathematics of some of the computations would change, but the aspect being attacked here would remain. Thus, it is clear that impermissible stereotyping had nothing to do with the age-correlated features of the plan that are involved here.

Under the KRS plan, the employee's age *in relation to his years of service with the employer* factors into retirement benefits calculations. The majority, by dubiously labeling that plan as facially discriminatory under the ADEA, uses that statute to invalidate a policy that lies far from the "essence" of the ADEA—and, in fact, does not implicate that essence at all. Age in relation to years of service performed for this employer is not the same as age qua age. *See Hazen Paper*, 507 U.S. at 612 (the ADEA "requires the employer to ignore an employee's age (absent a statutory exemption or defense); it does not specify *further* characteristics that an employer must also ignore.").

There is a further problem with the majority's analysis. As the *Lyon* court noted, in reasoning that applies at least as much to this case:

> [The employer's] very willingness to ignore ageist stereotypes and hire workers of any age actually appears to have exacerbated plaintiff's "problem." Those most "disadvantaged" are those who were oldest at the time of hiring. It would be contrary to the letter, as well as the spirit, of the ADEA to penalize the employer for the incidental ramifications of objectivity.

53 F.3d at 140 n.6. Here, the older workers "discriminated against" are sometimes exactly those who were hired later in life, and thus had not accumulated as many years with this employer as a younger worker (although, as example 3 shows *(supra,* at 17), sometimes exactly this factor will give the later-hired older worker an advantage). Thus, I believe that neither the intent nor the letter of the ADEA bars the reasonable KRS retirement plan, and I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 03-6437

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, — Plaintiff - Appellant

v.

JEFFERSON COUNTY SHERIFF'S DEPARTMENT, KENTUCKY RETIREMENT SYSTEMS, AND THE COMMONWEALTH OF KENTUCKY, — Defendants - Appellees

Before: BOGGS, Chief Judge; MARTIN, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, GILMAN, GIBBONS, ROGERS, SUTTON, COOK, McKEAGUE, and GRIFFIN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Western District of Kentucky at Louisville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the granting of summary judgment to defendants by the district court is REVERSED and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER
OF THE COURT

/s/
Leonard Green, Clerk